85-2167

Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CHAIM BABAD, BERNARD STEINMETZ and EMANUEL STEINMETZ, a Co-Partnership d/b/a J.R.R. REALTY CO.,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1) Does a Court judgment finding that a successor employer did not assume his predecessor's labor contract preclude by collateral estoppel, a finding of the National Labor Relations Board that, on the same evidence, the contract was assumed?

2) Must the NLRB articulate a basis for its failure to grant res judicata effect to the Court judgment, under the Sec v. Chenery doctrine, or can the Court of Appeals assume the Board's rationale?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals below, Docket No. 85-4068, is reported at _____ F2 _____. It is appended hereto as Appendix "A". That opinion enforced an Order of the National Labor Relations Board (hereinafter "NLRB.")

The opinion of the NLRB below is reported at 273 NLRB #189 (1985). Said Order adopted the findings of the Board's Administrative Law Judge (hereinafter "ALJ.") Both opinions are appended hereto as Appendix "B."

## JURISDICTION

The Court of Appeals Order is dated March 4, 1986. A timely Petition for Rehearing was denied on April 8, 1986. Stay of mandate was denied by the Court.

The statutory provision believed to confer jurisdiction on this Court to review the Order in question is 28 USC Sec. 1254(1).

## STATUTES INVOLVED

28 US Sec. 1738 imposes upon Federal Courts the duty to grant State Court judgments, res judicata effect.

> Judicial proceedings [of Courts of any State] shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the Courts of such State.

## REASONS FOR GRANTING THE WRIT

Since jurisdiction for enforcement and suits under labor contracts is granted to the courts, determinations regarding contracts will conflict with subsequent National Labor Relations Board findings regarding contracts. This Court must direct the NLRB to abide by court determinations of contract assumption. The Ninth Circuit has adopted this principle. The Second Circuit has not clearly done so. Litigants who have been told by a court of competent jurisdiction that they have not assumed a predecessor's labor contract should not find, four years later, that the NLRB has now determined that the contract was assumed. The foregoing is especially true when the very same documents and evidence form the basis for the

conflicting decisions.

Moreover, the Board must be directed to articulate reasons for rejecting a Court judgment pursuant to this Court's SEC v. Chenery decision.

## STATEMENT OF THE CASE

J.A.R. Management Corp., the "seller," executed a contract with the charging party ("Local 32B" or "Union") with reference to the employees at its 73-37 Austin Street location. JARU Properties, Inc., and ASCR Realty, Inc., as "sellers," on November 6, 1980, entered into a Contract of Sale of the premises with Joshua Estates, Inc., as "purchasers." Subsequently, J.R.R. Realty (hereinafter "JRR") Co., not "Corp.", took title to the property

on March 31, 1981. J.R.R. Realty Co., a partnership, was not affiliated in any way with J.R.R. Realty Corp., the seller. J.R.R. Realty Co. was not a signatory to [a] the collective bargaining agreement or [b] the Contract of Sale; (there is no evidence to indicate that even Joshua Estates Inc., in any way, assumed the collective bargaining agreement.) The purchaser also testified in the NLRB proceeding that there was no acceptance of the union contract by the purchasers.

Upon its assumption, J.R.R. did not hire its predecessor's employees (who resigned) but hired its own employees from other locations. (See ALJ decision) Nor did J.R.R. execute the collective bargaining agreement. The union demanded arbitra-

tion "concerning the transfer of the premises...on or about March 31, 1981, from J.A.R. to J.R.R. and the offer of employment to all former J.A.R. employees," and filed unfair labor practice charges over the same issue It also requested of Babad to assume the collective bargaining agreement by letter dated April 23, 1981.

Respondent, Babad et al, (hereinafter "Babad") commenced a special proceeding, in the State Court, to vacate the Notice of Intention to Arbitrate upon the grounds that [1] service of the Notice of Intention to Arbitrate was improper and that it should have no preclusive effect [2] no agreement to arbitrate existed since the collective bargaining agreement was not assumed, and [3] arbitration was precluded. A full opportunity was

afforded the parties to submit their positions to the Court. The Union did not remove the matter to Federal Court.

The New York State Supreme Court granted Judgment of Vacateur of the Notice on dual grounds i.e., the lack of assumption of the collective bargaining agreement and deferral to the N.L.R.B. Moreover, the Court's judgment vacated the Notice of Intention to Arbitrate, in effect a permanent stay of arbitration, against both the seller and the purchaser. On appeal by the union, the Appellate Division of State Supreme Court affirmed the judgment of permanent vacateur, and the consequent permanent stay of arbitration, as it related to purchaser J.R.R. but modified the judgment as it related to seller J.A.R. by issuing a temporary stay pending

N.L.R.B. disposition of the matter. (J.A.R. Management Corp. et al v. John J. Sweeney as President of Local 32B-32J 86 AD 2d 596, 446 NYS 2d 193.) No further appeal was perfected by the Union. The Appellate Division's decision was issued on January 18, 1982. The Supreme Court decision was dated June 1981 and its judgment was dated July 14, 1981. The N.L.R.B. hearing commenced thereafter; on March 15 and 16, 1982. The Court proceedings, in their entirety, were part of the N.L.R.B. record.

The A.L.J. specifically found the collective bargaining agreement assumed. The State Supreme Court Justice, in commenting on the very documents referred to by the ALJ as the basis for his finding of assumption, stated "There is nothing before this

Court to indicate that J.R.R. Realty Co. was a signator of the agreement of collective bargaining, nor is there an indication in writing that J.R.R. Realty Co. had agreed with J.A.R. Management Corp., its predecessor, in interest to adopt the provisions of the agreement between J.A.R. and Local 32B-32J, Service Employees International Union." The Appellate Division did not reverse the Court's decision. The N.L.R.B., after having this case under consideration before it for two and one half years, affirmed this aspect of the ALJ's decision without comment. Indeed, neither the ALJ nor the Board commented, at all, on the Court litigation and/or its impact on their findings, despite the fact that res judicata was argued forcefully before the Board.

On application for enforcement by the Board, the Court of Appeals held that since the contract was assumed "...the question of whether J.R.R. had legitimate business reasons for refusing to continue its predecessor's employees in their jobs is irrelevant to this decision." The Court of Appeals attempted to explain why res judicata did not bar the Board from finding a contract assumption. The Board had, however, not articulated any reason for failing to give the judgment res judicata effect.

What is therefore left is a naked question of law as outlined in the questions presented section of this Petition.

## POINT I

### THE BOARD IS COLLATERALLY ESTOPPED FROM FINDING A CONTRACT ASSUMPTION

The Supreme Court in Smith v. Evening News Association, 371 US 195, determined with finality, that "preemption" of the N.L.R.B. is inapplicable to actions under Sec. 301 of the Labor Management Relations Act. (29 U.S.C. Sec. 185.) Indeed, contract claims were properly left "to the usual processes of the law." Charles Dowd v. Courtney, 368 US 502, 513; NLRB v. Strong, 393 US 357 at fn. 5 (citing legislative history)

It is clear that Courts have jurisdiction under Sec. 301 of the Labor Management Relations Act (29 U.S.C.A. Sec. 185(c)) to entertain "suits for violations" of collective bargaining agreements. It is equally

clear that State Courts have concurrent jurisdiction of Sec. 301 suits with the Federal Courts (Dowd Box Co. v. Courtney, 368 US 502.) Their judgments, therefore, are equally binding.

In the instant proceeding the Courts found that the purchaser had not assumed the predecessor's labor contract. The Board found that it did.

> Although the authority of the Board to deal with an Unfair Labor Practice which also violates a collective bargaining agreement is not displaced by Sec. 301, the Board's authority does not supplant the jurisdiction of the Courts: Amalgamated Ass'n of Street Elec. Railing and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 297, 300 (1971); Smith v. Evening News, supra. An implicit collateral attack, launched through the filing of charges, premised on the contract, may not be entertained by the Board under the guise of different policy considerations. Chicot County Drainage Dist. v. Baxter

> State Bank, 308 US 371, 375-77 (1940); Swift and Co. v. U.S., 276 US 311, 326 (1928); Higginson v. Schoeneman, 190 F2d 32 (CADC 1951); 49 CJS Judgments Sec. 401, cf. Kalb v. Feuerstein, 308 U.S. 433, 439 (1940) (emphasis added.)

The Court held that

> We are of the opinion that the jurisdictional grant within Sec. 301 carries with it both the powers necessary to enforce judgments and to give judgments effect in such quasi-judicial forums as the NLRB, through the application of such doctrines as res judicata or collateral estoppel (citations omitted, but substantial, emphasis added) (NLRB v. Heyman et al 541 F2d 796 9th Cir. (1976))

As noted, heretofore, the Appellate Division of the New York State Supreme Court affirmed the vacateur of a notice of intention to arbitrate pursuant to New York's CPLR Sec. 7503, as against the Respondent. The New York State Supreme Court held;

"There is nothing before this

> Court to indicate that J.R.R. Realty Co. was a signator of the agreement of collective bargaining, nor is there an indication in writing that J.R.R. Realty Co. had agreed with J.A.R. Management Corp. its predecessor in interest to adopt the provision of the agreement between J.A.R. and Local 32B-32J, Service Employees International Union."

The record reflects that before both Courts were the "assignment" (not executed by the Respondent) and the "indemnity agreement" alluded to by the Second Circuit and the NLRB. Furthermore, the Appellate Division found that;

...the contract of sale did not compel J.R.R. to adopt the collective bargaining contract..

This Court has noted that state collateral estoppel/res judicata law applies to state court judgments. Migra v. Warren City, 104 S. Ct. 892, 896 (1984). The Second Circuit has

held that 28 U.S.C. Sec. 1738 is "the logical starting point for any analysis of the extent to which a prior State Court judgment precludes a subsequent action brought in a Federal Court. That statute imposes on Federal Courts the obligation to give full faith and credit to judgments entered by State Courts of competent jurisdiction. The Federal Court presented with a State Court judgment is required to give that judgment the same force and conclusive effect as it has in the State in which it was rendered." (Winters v. Lavine, 574 Fed. 2nd 46, 54 2nd Cir.) Moreover, that Court has stated that the applicability of 28 U.S.C. Sec. 1738 "ordinarily...would require an analysis of the res judicata effect of the State Court proceedings within that State, involving examination of the

local law of res judicata." (Winters v. Lavine, supra.)

The New York Court of Appeals has explained the doctrine of res judicata, etc., thusly.

> "Sound public policy requires that different decisions shall not be made on the same state of facts, and that a judgment rendered...shall be conclusive, as to the questions litigated and decided, upon the parties thereto and their privies, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the facts therein determined." (Fulton Co. G. E. Co. v. Hudson Riv. T. Co., 200 N.Y. 287, 296.) That principle requires that "what has been definitely determined by competent tribunal shall be accepted as irrefragable." It has been said that within the field in which the principle is applicable it "renders white that which is black, and straight that which is crooked. Facit excurvo rectum, ex albo nigrum. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy." (Jeter v. Hewitt et al, 22 How. [U.S.] 352.) The reasons under-

> lying the principle indicate the limits of the field within which the principle applies. "The fundamental principle governing the general doctrine of res adjudicata" is "that a party shall not be heard a second time on an issue which he has once been called upon and permitted to try and contest." (Henrick v. Biggar, 209 N.Y. 440, 444.) "The rules of law upon this subject are founded upon these evident principles or axioms that it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tired; but the public tranquillity demands that, having been done or so tried, all litigation of that question, and between those parties, should be closed forever. (Matter of N.Y.S. Labor Relations v. Holland Laundry, 294 N.Y. 480, 493.)

The doctrine elucidated herein has been restated, recently, by the Court of Appeals in Gramatan Home v. Lopez, 46 N.Y. 2nd 481, 485. The Court explained that;

Collateral estoppel, together with its related principles merger and bar, is but a component of the broader doctrine of res judicata which holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein, in any subsequent action (Matter of Shea, 309 N.Y. 605, 616; cf. Matter of McGrath v. Gold, 36 N.Y. 2d 406, 410-411.) This principle, so necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again. (B.R. DeWitt, Inc. v. Hall 19 N.Y. 2d 141, 144; Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18.) Collateral estoppel is a corollary to the doctrine of res judicata; it permits in certain situations the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided. (Statter v. Statter, 2 N.Y. 2d

> 668; Siegel, New York Practice, Sec. 464, Par. 614; 9 Carmody-Wait 2d N.Y. Pract. Sec. 63:204, Par. 208-209; cf. Ashe v. Swenson, 397 U.S. 436, 443.)

The Court then enunciated the well followed rule that;

> Thus, it is well settled that the term parties to a judgment within the contemplation of the rule of collateral estoppel is not confined to those who are named in the record or enter an appearance. For example, collateral estoppel bars not only parties from a previous action from litigating an issue decided therein, but those in privity with them as well (Downey v. Seib, 185 N.Y. 427, 433)...the term denotes a mutually successive relationship of the same rights to the same property (see Downey v. Seib, supra; Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 129), and permits utilization of collateral estoppel for the benefit of or against persons who were not parties to the previous action but who were connected with it to such an extent that they are treated as if they were parties.

In Winters v. Lavine, the Court noted that,

> "in its traditional formulation, the rule of res judicata can have dramatic impact: 'The general rule of res judicata is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not actually raised and decided in that action.'" The first judgment, when final and on the merits, thus puts an end to the whole cause of action.'" (Winters v. Lavine, supra, 56, Footnote "10", emphasis added.)

The Court further found,

> "The New York courts appear to recognize that the two lawsuits are based on the same cause of action 'if a different judgment in the later action would destroy or impair rights or interests established by the earlier action.'" "Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, (see also Winters v. Lavine, supra at 56, see substantial authority and at 58, Footnote "13"; Schwartz v. Public Administrator, 24 N.Y. 2d 65.)

It is certain that if the Board's order were permitted to be enforced in this enforcement proceeding, this proceeding, if unfavorably decided to Babad would clearly "destroy or impair rights or interests established by the first judgment." If the Court were to determine, now, that an assumption of the agreement exists and that the substantive terms of the alleged collective bargaining agreement must be adhered to, then the New York State Supreme Court's judgment staying the arbitration and finding that no agreement was assumed in J.A.R. v. Sweeney would be rendered null and void.

Nor is the res judicata, etc., effect of a judgment affected by the existence, or lack thereof, of an evidentiary hearing. The Court, in

Potter v. Emerol Mfg. Co., 275 AD 265, 89 N.Y.S. 2d 68, 70, held;

> Though the facts underlying such determination were supplied by affidavits instead of oral testimony, we think that a judgment on the merits entered on such motion would be a bar to a second suit if there is sufficient identity between the causes of action alleged in the two complaints.

Indeed the Court went even further and held in Eidenberg v. Zellermayer, 5 AD 2d 568, 174 N.Y.S. 2d 300, 304.

> On this history it is clear that the prior judgment is res judicata as to the present cause of action. A motion granting summary judgment is on the merits. Riley v. Southern Transportation Co., 278 App. Div. 605, 101 N.Y.S. 2d 906; 5 Carmody-Wait, Cyc. N.Y. Prac., Summary Judgment, Sec. 44. A judgment on the merits precludes the maintenance of a second action based upon the same transaction if the evidence and the issues in both are the same Marsh v. Masterson, 101 NY 401, 407, 5 N.E. 59, 61;

> Hull v. Hull, 225 N.Y. 342, 353-354, 122 N.E. 252, 255-256; Cromwell v. County of Sac, 94 U.S. 351, 352-353, 24 L.Ed. 195; Restatement, Judgments, Sec. 61.) The former judgment is final not only as to every essential matter which was received to sustain or defeat the claim or demand but as to any other admissible and essential matter which might have been offered for that purpose. Pakas v. Hollingshead, 184 N.Y. 211, 217, 77 N.E. 40, 42, 3 L.R.A., N.S., 1042; Cromwell v. County of Sac, supra)...even assuming, and it is not clear that this is so, that the subsequent action proceeds on a different theory, the prior judgment may, nevertheless, be a bar. A judgment on the merits precludes another action based on the same foundation facts -- in a special sense, the same cause of action -- even though a different theory for similar relief is set forth (Schuylkill Fuel Corp. v. B & C Neiberg Realty Corp., 250 N.Y. 304, 165 N.E. 456; Restatement, Judgment, supra Sec. 63.)

Clearly, "privity" is established where there is a substantial identity of interest between the litigating and new party. It is well

established that preclusion of relitigation will take effect where one's interests were represented in the prior action, (accord Ashton v. City of Rochester, 133 N.Y. 187, 193, 30 N.E. 965, 31 N.E. 334 (1892); Weisz v. Levitt, 59 ad 2D 1002, 1003 399 N.Y.S. 2d 720, 721 (3d Dept. 1977); Graham v. Board of Supervisors, 25 A.D. 2d 250, 252, 269 N.Y.S. 354, 361 (Sup. Ct. 1929), aff'd, 228 App. Div. 750, 238 N.Y.S. 887 (4th Dept. 1930.)

Thus the "essential consideration is that the interests...were at stake in the prior litigation" (Grossman v. Axelrod, 466 F.Supp. 770, 775.)

Accordingly;

> The privity of interest necessary to bind a party to the results of a prior proceeding to which he was not a named party can be

> established in a number of ways. Thus, it is established when it is shown that the defendant in the subsequent action was an officer, director or the major shareholder of the corporate party in the first action. Towle v. Boeing Airline Co., 364 F. 2d 590 (8th Cir. 1966); Hyman v. Regenstein, 258 F.2d 502 (5th Cir. 1958); cert. denied sub nom. Hyman v. Continental Illinois National Bank, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed. 2d 575 (1959); In re Shea's Will, 309 N.Y. 605, 132 N.E. 2d 864 (1956). See also 1B Moore's Federal Practice, Par. 0.411 at 1558. It may also be established by showing that the party who is sought to be bound by the first judgment was actually a participant in and controlled the prior litigation. See e.g. Bros., Inc. v. W.E. Grace Mfg. Co., 261 F. 2d 428 (5th Cir. 1958); Ark-Tenn Distributing Corp. v. Breidt, 209 F.2d 359 (3d Cir. 1954); 1B Moore's Federal Practice, Par. 0.411. (Walter Heller and Co. v. Cox, 343 F. Supp 519, 524.)

Clearly then, there is no question but that the Court's determination in the J.A.R. v. Sweeney, facet of the case barred relitigation of the

same issues where assumption of the contract was an issue and Local 32B was a party in both proceedings. (See also Newsday v. Ross, 80 AD 2d 1, 437 N.Y.S. 2d 376, St. Grand v. City of New York, 32 N.Y. 2d 300, 304 344 N.Y.S. 2d 938, 943, Weinstein Korn & Miller, N.Y. Civil Practice Par. 5011.32 (1977) which expand this doctrine.) Furthermore, the Board, under the above case law, should be held barred from relitigation in that they are in privity with Local 32B. [See Ryan v. New York Telephone, 62 NY 2d 494, Valvolizza v. Krieger, 39 AD 2d 446, Read v. Sacco, 49 AD2d 471, Berstein v. Birch Wathen School 71 AD 2d 129, Drier v. Randforce Amusement Corp. 14 Misc 2d 362.)

In the following representative cases, where liabilities on

contractual obligations were asserted against defendants, and the defendants' obligations under the contracts were determined in an earlier proceeding, federal courts held that a stranger to the earlier proceeding could collaterally estop a defendant from relitigating issues as to its obligations under the contract.

In Zdanok v. Glidden Co., Durkee Famous Foods Div., (1964, CA2 N.Y.) 327 F2d 944, cert. den. 377 U.S. 934, 12 L Ed. 2d 298, 84 S. Ct. 1338, causes of action were alleged growing out of the breach of a collective labor contract. An action had originally been brought by five employees against their employer, and the court of appeals determined that these employees were entitled by the contract to certain rights which they had acquired,

remanding the case for a determination of damages. The day after this decision, a large number of other employees, not involved in the proceedings previously, invoked the diversity jurisdiction of the same District Court by filing a complaint substantially identical with that in the first case, the two actions were consolidated, and the District Court rendered an interlocutory judgment in favor of the plaintiffs on the issue of the employer's liability. The employer appealed from this judgment, and the question relevant to the rule of mutuality was whether, despite the difference in parties plaintiff, the employer was precluded by the prior judgment. The Court answered the question in the affirmative, determining that abandonment of

mutuality was sound unless (1) assertion of the plea of estoppel in successive actions would create anomalous results; or (2) the party adversely affected by the doctrine had not had a full and fair opportunity to litigate the issue effectively. It was held that the employer's opportunity to litigate the first case was both full and fair.

A suit was brought by a newspaper publisher to enjoin a strike by a union in violation of a labor contract, in New York News, Inc. v. New York Typographical Union (1974, SD NY) 374 F. Supp. 121. The union had previously been enjoined by a state court in an action by a different publisher with a similar collective bargaining agreement, and Judge Gurfein held that plaintiff could assert colla-

teral estoppel against the union, notwithstanding the lack of mutuality of estoppel, since the union had had a full opportunity to litigate the issue in the prior action.

Federal courts have permitted the offensive use of collateral estoppel in a number of cases involving matters other than tort and contract claims, holding that a defendant was estopped to relitigate issues decided against it in earlier proceedings brought by a different plaintiff. The following decisions are illustrative.

In Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 58 L. Ed 2d 552, 99 S. Ct. 645, this Court held that the scope of collateral estoppel was no longer limited by the doctrine of mutuality of parties whereby a party could not use a prior judgment as an

estoppel against the other party unless both parties were bound by the judgment, and approved offensive use of the rule against the defendants. This was a stockholder's class action against a corporation and certain of its officers in which plaintiff alleged that defendants had issued a materially false and misleading proxy statement, and before this action came to trial, the Securities and Exchange Commission instituted an injunction action against the same defendants in the DIstrict Court which ultimately found that the proxy statement was materially false and misleading. Thereafter, plaintiff in the stockholder's action moved for partial summary judgment against the defendants asserting that they were collaterally estopped from relitigating the issues that had been resolved

against them in the Commission's action. This Court affirmed the Second Circuit Court which had reversed the District Court's determination that such an application of collateral estoppel would violate the defendant's seventh Amendment right to a jury trial, the Supreme Court holding that defendants were precluded, under the plaintiff's offensive use of the collateral estoppel doctrine, from relitgating the issue of the material falsity and misleading nature of the proxy statement.

Thus, the doctrine of collateral estoppel, embodied in 28 U.S.C. Sec. 1738 (1982), must apply herein. Sec. 1738 provides:

> [J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its

> Territories and Possessions as they have by law or usage in the courts of such State...

In Allen v. McCurray, 449 US 90, 96 (1980), this Court held that Sec. 1738 generally requires that Federal courts give preclusive effect to State court judgments where the Federal claimant has a "full and fair opportunity" to litigate the Federal claim in the earlier State court case. Id. at 95-96. In Allen, the Court, in giving preclusive effect to a State court judgment on a federal Constitutional claim under 42 U.S.C. Sec. 1983, found that there is no universal right to litigate Federal claims in Federal court. See id.

This Court has consistently emphasized the importance of collateral estoppel in fulfilling the purpose for which civil courts have been

established: the conclusive resolution of disputes within their jurisdiction. Kremer v. Chemical Construction Corp., 102 S. Ct. 1883, 1889 N.6 (1982). Invocation of the doctrine of collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." Allen, 449 U.S. at 94. This doctrine also promotes "the comity between State and Federal courts that has been recognized as a bulwark of the Federal system." Id. at 96; see Kremer, 102 S. Ct. at 1890 N.6.

In Blonder -Tongue Labs, Inc. v. University of Illinois Foundation, 402 US 313 (1971), a case relied on in Allen, the Supreme Court for the first time, rejected the requirement of mu-

tuality. The mutuality requirement limited collateral estoppel claims to cases in which the same parties were involved in the prior lawsuit. The Court allowed a defendant to preclude a plaintiff's claim based on a prior judgment on the same issue against the plaintiff in a suit to which the defendant was not a party. That ruling has been reaffirmed, see Allen, 449 U.S. at 95, and even expanded to allow "offensive" use of collateral estoppel, Parklane Hosiery Co. v. Shore, rather than merely the "defensive" collateral estoppel employed in Blonder-Tonque.

Respondent in the instant action is seeking defensive use of collateral estoppel. There is little doubt that the Union received a full and fair opportunity to litigate the issue of whether Babad assumed the predecessor's

labor contract. Thus, the Union intervenor herein, and the Board are collaterally estopped from relitigating that issue in this action.

As noted heretofore the Appellate Division of the New York State Supreme Court affirmed the vacateur of a notice of intention to arbitrate pursuant to New York's CPLR Sec. 7503, as against the Respondent. The New York State Supreme Court held;

> "There is nothing before this Court to indicate that J.R.R. Realty Co. was a signator of the agreement of collective bargaining, nor is there an indication in writing that J.R.R. Management Corp. its predecessor in interest to adopt the provisions of the agreement between J.A.R. and Local 32B-32J Service Employees International Union."

Thus in a case strikingly similar to the instant one, United States v. ITT Rayonier, Inc.,

627 F.2d 996 (1980), the defendant appealed a summary judgment granted to the Environmental Protection Agency ("EPA") in an action initiated by the agency for violations of water pollution discharge permits. The EPA and the Washington State Department of Ecology had concurrent jurisdiction over water pollution discharge permits. In a prior state enforcement action instituted by the Department of Ecology, the identical issue relating to defendant's discharge permits was litigated and determined in its favor. The EPA argued that its concurrent enforcement powers negated applicability of collateral estoppel.

Observing that the Federal Water Pollution Act does not specifically mandate a de novo hearing in Federal court after an action has

been brought in State court, the Ninth Circuit concluded that application of collateral estoppel was entirely appropriate when, as here, the State court entered a final judgment on the identical issue. That the EPA was neither a party nor privy to the prior State court action was immaterial. A nonparty may be bound if it has been accorded virtual representation of its position by reason of a closely aligned interest with the party in the earlier action. Since the interests of the State agency and the EPA were identical in enforcing the same permits, relitigation of the issue previously resolved by the State court was precluded.

As is evident herein, this Board "finding" of assumption of the contract is not based on the "expertise" of an agency in interpreting a

statute it is consigned to enforce. Rather, the issue is a simple question of contract assumption. The Courts clearly owe no deference to a Board finding on such an issue. To the contrary, the Courts are specifically consigned by Congress to handle contract litigation (see Page 12 supra.) The more so where such a finding conflicts with the, non exclusionary, language and mandate of 28 USC Sec. 1738. The Board is not immune from the reach of the law. The Board cannot "...collaterally attack" the State court finding "...under the guise of different policy considerations." (NLRB v. Heyman, supra.) As the Ninth Circuit stated in NLRB v. Heyman,

> The Board was faced with the same parties; essentially the same contract issue, albeit implicitly, that existed in the distinct court; the same union

> arguments; and the presence of a judicially decreed recission. To fail to give any effect to the District Court's judgment would here render Sec. 301 migatory and defeat the intentions of Congress that...contract violations be left to the usual processes of the law...The Board's authority...does not extend on the first instance to contract litigation.

A judgment of a Court of competent jurisdiction binds the Board.

Nor is the Board owed deference on an issue of law, i.e. whether the contract was assumed. "Questions of law are the only ones which may be reviewed by the judiciary NLRB v. Link-Belt Co. 311 US 584, 597" (Aluminum Co. v. NLRB) 159 F2 523.) In the Aluminum case the Court rejected a contract issue finding of the Board as being a misapplication of the law. The Second Circuit has also recognized that deference is misplaced where an agency

is not applying "purely agency law." Lorenz Schneider v. NLRB 517 F2d 445 (Friendly, J., 2nd Cir. 1975.) The Court held; "a reviewing Court must bow to the Board's view in an area outside its expertise only when this is fairly 'conflicting.'" (Id at 453) The issue before the Court revolved around "master-servant" common law interpretations. (See also Local 777 v. NLRB 603 F2d 862 and Allied Chemical v. Pittsburg Plate Glass, 404 US 157 at 166 holding "the determination by the Board as to who are employees has never been immunized from judicial review.")

Of course, the entire instant review is made more difficult because the Board has not even addressed this issue, much less articulated a reasoned basis for distinguishing the Court judgment from its own. Nevertheless

the Board should not be permitted to play cat and mouse with the Court judgment. It should have met the issue rather than ignoring it and depriving this Court of reviewing its analysis.

As is evident, however, the Ninth Circuit has squarely dealt with this issue. Its logic is manifest. A Court of competent jurisdiction has found that the contract was not assumed. The Board cannot blithely hold that it was, if that judgment is to have any finality. The Second Circuit as will be shown has refused to follow the Ninth Circuit's ruling.

This Court should adopt the reasoning of the Ninth Circuit and preclude the Board from issuing a conflicting decision, on contract assumption, to a valid final judgment on the issue. It is here stressed that

so long as Section 301 jurisdiction resides in the Courts there will be conflict between Court and Board determinations. This Court must announce that the Board must abide by Court rulings on matters consigned to the Courts.

There is a distinction between a National Labor Relations Board finding of bad faith bargaining with a remedy of an order to honor specific terms, and an actual assumption of a contract. The cases cited by the Second Circuit reflect conduct of a Respondent that would make it bad faith bargaining to refuse to honor certain contract terms. As a remedy for that conduct, the Board can order reduction of the contract to writing and adherence to its terms. Here there was no conduct indicating an

assumption. Rather the Board has held the written words to reflect an assumption. Hence, the only "evidence" relied upon by the Board are the various exhibits in the record, not Respondent's conduct. This distinguishes the the case from the cases cited by the Court. The intention of the parties is thus paramount. Moreover it is the very same documents, presented to the State Court, that the Court stated

> There is nothing before this Court to indicate that JRR Realty Co. was a signator of the agreement of collective bargaining, nor is there an indication in writing that JRR Realty Co. had agreed with JAR Management Co., its predecessor in interest, to adopt the provision of the agreement between JAR and Local 32B-J, Service Employees International Union.

The Second Circuit's statement, at Footnote 4, that

> The New York Courts did not decide... whether JRR was bound by the other provisions of the labor contract

clearly overlooked or misapprehended this finding by the State Court. The Appellate Division also found that the contract of sale did not assume the labor contract.

The Court, in citing Tucker v. Arthur Anderson and Co., found that collateral estoppel only bars relitigation of issues that are "essential to the judgment." The Court overlooked several points in this regard.

As noted, this Court, and 28 USC Sec. 1738, require that state law be referred to in determining the appropriate standard of res judicata applicability. Migra v. Warren City School District Board, 104 S.Ct. 892, 896 (1984);

In Ottley v. Sheepshead, ____ F2 ____, 85-7296(1985) 2nd Cir., the Court, in applying New York law held that relitigation is precluded...

> where (1) the particular factual and legal issues in question were necessarily raised and decided in the prior action; (2) the party against whom the doctrine is invoked had a full and fair opportunity to litigate those issues in the present controversy and in the prior action are identical. Gramaton Home Investors Corp. v. Lopez, 46 N.Y. 2d 481, 485-86, 414 N.Y.S. 2d 308, 311 (1979).

In this proceeding the "particular factual and legal issues" were raised in the prior action. The issue of contract assumption was exhaustively litigated. Intervenor, Local 32B, had a full and fair opportunity to litigate the contract assumption issue. The issue of contract assumption is identical. Had the

State Court held the contract assumed, it would have directed arbitration. The Court did not find that a contract existed but that arbitration provisions thereof were unclear. It found that no contract existed. It was "essential" to the State Court's judgment staying arbitration that the contract was not assumed.

Furthermore, this proceeding should be judged as res judicata, not collateral estoppel, in that the "...parties or their privies" should be barred from relitigating the same cause of action. Local 32B is the instant intervenor. The Board is their privy.

> The principle of res judicata bars a subsequent suit between the same parties or their privies where a prior action has resulted in a judgment on the merits of the same cause of action. Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1232-

> 33 (2d Cir.), cert. denied, 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977). Res judicata prevents the subsequent litigation of any defense or ground for recovery that was available to the parties in the original action, whether or not it was actually litigated or determined. Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); Schmieder v. Hall, 545 F.2d 768, 771 (2d Cir. 1976), cert. denied, 430 U.S. 955, 97 S.Ct. 1601, 51 L.Ed. 2d 805 (1977)...Whether or not the first judgment will have preclusive effect depends on whether a different judgment in the second action would impair rights or interests created by the first judgment, whether the same evidence is necessary to support both claims, and whether the essential facts in the second were present in the first. Herendeen v. Champion International Corp., 525 F.2d 130, 133-34 (2d Cir. 1975); McNellis v. First Federal Savings and Loan Ass'n, 364 F.2d 251, 255-56 (2d Cir.), cert. denied, 385 U.S. 970, 87 S.Ct. 504, 17 L.Ed.2d 434 (1966).

Tucker, supra at 726, 727.

Clearly the different judgment in this case "...would impair rights or

interests created by the first judgment." If the contract was assumed, arbitration must proceed. Of course, the same evidence and facts are present in both proceedings. Accordingly, the "..essential to the judgment" requirement of "collateral estoppel" is not relevant to a "res judicata" issue. As noted heretofore, however, it was "essential" to the grant of a stay that the contract not have been assumed. The Court had to decide that the contract was not assumed, or it would have directed arbitration under it.

## POINT II

## THE FAILURE TO ARTICULATE THE BASIS FOR A RULING REQUIRES REMAND

Equally significant herein is the applicability of SEC v. Cherney Corp., 318 US 80 (1943) to this

proceeding. The Supreme Court there held that

> the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

id at 87.

The Second Circuit has attempted to "interpret" the Board's conduct regarding the State Court judgment. The Board has not explained its conduct, however. We do not know why the Board regarded itself not bound by the State Court judgment. Nor do we know the basis of the finding of assumption. (The Board also does not indicate if it rejects New York contract law.)

The record thus does not disclose the agency's actions in rejecting the State Court judgment, or its rationale for doing so. While this

Court had substantial leeway in dealing with a District Court judgment, it is more circumscribed in dealing with an administrative agency order. The order must disclose the basis of the action of the agency. If its basis is incorrect, a remand is mandated. A fiorti where the agency does not articulate its rationale and the Court reviewing the action must guess at the basis for the agency action.

At the very least a remand is appropriate to require the Board to articulate why it was not bound by the State Court judgment.

## CONCLUSION

In order to resolve an important recurrent area of labor law, i.e. res judicata/collateral estoppel

effect of Court judgments regarding contracts on subsequent NLRB determinations on the same issues, this Court should grant certiorari. Moreover, there is a strong likelihood of inter circuit conflict in this matter already. To resolve this question certiorari is appropriate. Finally the failure of an administrative agency to articulate a basis for rejecting a judgment is itself a basis for remand to the agency. To the extent that the Sec v. Chenery doctrine requires new vigor from this Court, the writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 119—August Term, 1985

(Argued October 11, 1985 Decided March 4, 1986)

Docket No. 85-4068

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

—v.—

CHAIM BABAD, BERNARD STEINMETZ and EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO.,

*Respondent.*

Before:

LUMBARD, VAN GRAAFEILAND and MESKILL,
*Circuit Judges.*

Petition by the National Labor Relations Board for enforcement of its order in *Chaim Babad, Bernard Stein-*

*metz and Emanuel Steinmetz, A Co-Partnership d/b/a J.R.R. Realty Co.*, 273 N.L.R.B. No. 189 (1985).

Petition for enforcement granted.

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MORRIS TUCHMAN, New York City, *for Respondent.*

JESSE GILL, National Labor Relations Board, Washington, D.C. (Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, W. Christian Schumann, National Labor Relations Board, Washington, D.C., of counsel), *for Petitioner.*

Ira A. Sturm, Manning, Raab, Dealy & Sturm, New York City, *for Intervenor Local 32B-32J, Service Employees International Union, AFL-CIO.*

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MESKILL, *Circuit Judge*:

The National Labor Relations Board (NLRB or Board) found that respondent J.R.R. Realty Co. (J.R.R.) had violated subsections 8(a)(1), (3) and (5) of the National Labor Relations Act (Act), 29 U.S.C. §§ 158(a)(1), (3) and (5) (1982). The Board seeks enforcement of a reme-

dial order requiring J.R.R. to cease and desist from the unfair labor practices, to recognize and bargain with intervenor, Local 32B-32J, Service Employees International Union, AFL-CIO (union), and to offer reinstatement and back pay to the discharged employees.

The petition to enforce the order is granted.

## BACKGROUND

This labor dispute concerns events that took place in 1980 and 1981 at an apartment building in Queens, New York. The building was owned by JARU Properties, Inc. and ASCR Realty, Inc. (JARU and ASCR) and was managed by J.A.R. Management Corp (J.A.R.). J.A.R. employed six members of Local 32B-32J to run the building. The collective bargaining agreement between J.A.R. and the union contained a provision which stated that if J.A.R. sold the apartment building, it would require the purchaser to agree in writing to adopt the agreement and to offer employment to all of the employees.

In November 1980, JARU and ASCR entered into a contract to sell the apartment building to Joshua Estates, Inc., a nominee corporation for J.R.R. Realty.[1] The sale contract provided that the purchaser would take title "subject to" a variety of specified permitted encumbrances. The collective bargaining agreement with the union was specifically listed as one of the permitted

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1 J.R.R. is a partnership composed of Chaim Babad, Bernard Steinmetz, Emanuel Steinmetz and members of their families. Coincidentally, Alfred Rose, J.R.R.'s secretary, was secretary of JARU and vice president of J.A.R. Management. J. App. at 266, 269, 270.

encumbrances and a copy of the agreement was attached to the sale contract. J. App. at 179.

On March 31, 1981, at the title closing, attorney Harry Newman, on behalf of Joshua Estates, and Chaim Babad, on behalf of J.R.R. Realty, executed an assignment of the sale contract to J.R.R. Realty. At the same time, the former owners and J.A.R. specifically assigned the collective bargaining agreement between J.A.R. and the union to J.R.R. Realty. Finally, Joshua Estates and J.R.R. executed an indemnity agreement in which they agreed that title to the building was subject to all obligations of the sellers under the leases, contracts and agreements in effect on the closing date and to hold the sellers harmless from any claims and liabilities arising thereunder. Immediately after the closing, Babad and Newman told the attorney for JARU and ASCR that J.R.R. intended to replace all of the building employees.

On April 1, 1981, the day following the closing, one of J.R.R.'s partners, Chaim Babad, sent a family of five employees to live in and staff the building. That same day, Babad informed the superintendent, an elevator operator and a porter that they were discharged. Babad offered these three employees money to give up their jobs. Only one of the three accepted the offer. On April 2, the other two employees contacted the union. On April 3 union-organized picketing of the building began. Several days later, Babad again tried to induce the superintendent to leave his job and asked the superintendent to communicate Babad's offer to the other employees to make a "better deal but [with]out the union." J. App. at 45-47. Picketing continued throughout most of April. Late in the month, Babad and the union tried to settle the dispute. An agreement between J.R.R. and the union was

prepared but never signed. Babad continued to negotiate directly with the six employees. By the end of the month all six employees had reached individual settlements with Babad; these settlements were conditioned upon release of all the employees' claims against J.A.R. and J.R.R.

The union filed charges with the NLRB in April and May of 1981. The union alleged that J.R.R. committed unfair labor practices under subsections 8(a)(1), (3) and (5) of the Act when it refused to recognize and bargain with the union, when it discharged the employees because of their union membership and when it bypassed the union and negotiated individually with the employees.[2] At about the same time, the union filed a notice of intention to arbitrate against J.A.R. and J.R.R. in state court.[3]

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2 The relevant language of the Act provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with . . . or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (3) by discrimination in regard to . . . tenure of employment . . . to . . . discourage membership in any labor organization . . . ;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees . . . .

29 U.S.C. § 158(a) (1982).

3 J.A.R. and J.R.R. moved to vacate the notice of intention to arbitrate. The New York Supreme Court granted the motion, finding no evidence before it to indicate that J.R.R. was bound by the arbitration provision of the contract and finding that the union's filing of an unfair labor practice claim with the Board deprived it of jurisdiction to order arbitration. The Appellate Division modified the judgment of the Supreme Court. It affirmed the judgment of the lower court that J.R.R. was not bound by the arbitration provision. *J.A.R. Management Corp.* v. *Sweeney*, 446 N.Y.S.2d 193, 194 (App. Div. 1982).

In NLRB proceedings, the ALJ found that J.R.R. had committed an unfair labor practice when anti-union sentiment led it to discharge the predecessor's employees. The ALJ also found that J.R.R. was a successor employer under *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972), and thus had an obligation to recognize and bargain with the union. The ALJ concluded that J.R.R. breached that obligation when it bypassed the union and dealt individually with the employees.

A three member panel of the Board affirmed the ALJ's findings, conclusions and rulings. It adopted the ALJ's recommended order with a minor modification not relevant here. The Board now petitions for enforcement of its order. In response, J.R.R. contends that it did not assume the collective bargaining agreement and thus had no duty to bargain with the union or to recognize the union as the representative of the discharged employees. J.R.R. also contends that valid business purposes, not anti-union animus, prompted it to discharge its predecessor's employees.[4]

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[4] J.R.R. also argues that the Board was collaterally estopped from finding that it assumed the union contract because the New York Supreme Court found that J.R.R. did not expressly agree to adopt the contract. This argument is without merit. Collateral estoppel does not apply to issues that were not "essential to the judgment." *Tucker* v. *Arthur Andersen & Co.*, 646 F.2d 721, 728 (2d Cir. 1981). The New York courts determined that J.R.R. was not bound by the *arbitration provision* of the labor contract. The New York court relied on cases requiring an express agreement *to arbitrate*. *American Utex Int'l* v. *ICC Corp.*, 425 N.Y.S.2d 579, 580 (App. Div. 1980), *aff'd*, 437 N.Y.S.2d 304 (1981); *Kahn* v. *Biernbaum*, 390 N.Y.S.2d 92, 93 (App. Div. 1976). The New York courts did not decide, and did not need to decide, whether J.R.R. was bound by the *other* provisions of the labor contract.

## DISCUSSION

The Board's findings of fact are conclusive when they are supported by substantial evidence on the record as a whole. The Court should defer to the Board's interpretation and application of the Act in doubtful situations. *Local 259, U.A.W.* v. *NLRB*, 776 F.2d 23, 26 (2d Cir. 1985); *see also NLRB* v. *Local Union No. 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 691-92 (1951); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

There was substantial evidence from which the Board could conclude that J.R.R. assumed the labor contract. Once covered by the contract, J.R.R. could not "terminate or modify" the contract without adhering to the requirements of 28 U.S.C. § 158(d)(1)-(4). Since J.R.R. makes no pretense of such adherence, the question of whether J.R.R. had legitimate business reasons for refusing to continue its predecessor's employees in their jobs is irrelevant to this decision.

1. *Adoption of the Collective Bargaining Agreement*

There is no legal obligation to hire all of a predecessor's employees when one purchases the predecessor's business, but one may voluntarily assume the predecessor's labor contract. *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union*, 417 U.S. 249, 261 (1974); *Burns*, 406 U.S. at 287. In determining whether an employer has assumed its predecessor's labor contract, the NLRB is not bound by technical rules of

contract law; rather, it may adapt those rules to the collective bargaining context. *American Federation of Television & Radio Artists* v. *Inner City Broadcasting Corp.*, 748 F.2d 884, 886-87 (2d Cir. 1984); *NLRB* v. *World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981); *NLRB* v. *Donkin's Inn, Inc.*, 532 F.2d 138, 141-42 (9th Cir.), *cert. denied*, 429 U.S. 895 (1976).

There is substantial evidence in the record in this case that J.R.R. assumed its predecessor's labor contract. The sale contract between JARU and ASCR, and Joshua Estates, specifically provided that the labor contract was a permitted encumbrance. At the closing both the sale contract and the labor contract were assigned to J.R.R. Moreover, J.R.R. agreed to indemnify JARU and ASCR from "all claims and liabilities arising under the . . . service and maintenance contracts." J. App. at 275. Joshua Estates, the named purchaser, was clearly acting as J.R.R.'s agent in the sale transaction. The immediate assignment of the sale contract and the deed to J.R.R. is evidence of this, as is the fact that Babad and Steinmetz, two J.R.R. partners, furnished personal checks for $110,000 of the $165,000 down payment for the sale. Furthermore, Alfred Rose, an officer of JARU and ASCR, stated that Babad and Steinmetz "were the intended purchasers of the building." J. App. at 18. Babad's repeated attempts to induce the union members to quit the union and sign releases of their claims are evidence of J.R.R.'s awareness of its obligations under the labor contract.

J.R.R. asserts that the agreement in the sale contract to take the property "subject to" the labor contract was not an agreement to assume the labor contract. This assertion is premised on J.R.R.'s view of New York property and

contract law. Even if that view were correct, however, the Board is not bound here by principles of state contract law.

J.R.R. also claims that it did not execute the assignment of the labor contract. It fails to mention that Alfred Rose, who executed the agreement for the assignor, was also an officer of J.R.R. The Board was therefore permitted to conclude that Rose accepted the assignment for J.R.R. *See* note 1, *supra*.

The Board thus properly found that J.R.R., having assumed its predecessor's labor contract, was bound to abide by the terms of that contract.

2. *The Unfair Labor Practices*

The Board's finding that J.R.R. committed the unfair labor practices charged to it is supported by substantial evidence. One of J.R.R.'s partners, Babad, bypassed the union and bargained individually with the employees over the discharge of employees. This failure to bargain collectively with the union violated section 8(a)(5) of the Act. *See, e.g., NLRB* v. *Pepsi-Cola Bottling Co.*, 449 F.2d 824, 831 (5th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972).

J.R.R. violated section 8(a)(3) of the Act when it discharged employees because of their union membership and replaced them with non-union employees. *See NLRB* v. *Berger Transfer & Storage Co.*, 678 F.2d 679, 692 (7th Cir. 1982) ("Where anti-union considerations result in the layoff of employees, the employer has violated section 8(a)(3) . . . ."). J.R.R. violated section 8(a)(1) of the Act when its partner, Babad, tried to induce union members to forego the protections of their union contract by

renouncing their membership in the union and releasing J.R.R. from any claims that the union or its members might have against it. *Cf. NLRB* v. *Monroe Tube Co.*, 545 F.2d 1320, 1327 (2d Cir. 1976) (solicitation of employee's withdrawal from union would violate section 8(a)(1) if facts and circumstances suggested that coercion was likely).

The Board's petition for enforcement of its remedial order is hereby granted.

APPENDIX B

DHDe

273 NLRB No. 189

D--2574
Forest Hills, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO.

and

Cases 29--CA--8809
29--CA--8880

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On 3 September 1982 Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The judge found, and we agree, that Ezekiel Correa was not a supervisor within the meaning of the Act, although he did act as an agent for the Respondent. None of the parties has excepted to the finding that Correa was not a supervisor. We note, however, that Correa testified, without providing any details, that he "hired" the porter at the Respondent's building. Although the "hiring" of an employee is often a dispositive indicator of supervisory status, the "hiring," just like any other indicium of supervisory

status, must reflect some meaningful measure of independent judgment. Thus, an individual may "hire" an employee in the colloquial sense, yet not be a supervisor within the meaning of the Act if the "hiring" individual is merely performing a ministerial act or carrying out the directions of another who actually possesses the necessary authority. See, e.g., *Bricklayers Local 44 (Raymond International)*, 207 NLRB 354, 356 (1973). In the instant case, none of the detailed evidence concerning Correa's day-to-day authority demonstrates any meaningful indicia of supervisory authority. Instead, it appears that Correa, at most, acted as a leadman or a conduit between the employees and the Respondent. Accordingly, we are unwilling to confer supervisory status on Correa merely on the basis of his undetailed statement, particularly in view of the fact that none of the parties now contends that he possessed any supervisory authority.

## The Remedy

Contrary to the judge, we find that the amounts of money paid by the Respondent to the discriminatees in "settlement" of their claims for "severance pay" should be included in the discriminatees' interim earnings for purposes of the make-whole remedy. *A.S. Abell Co.*, 230 NLRB 17, 21 (1977); 243 NLRB 171 (1979). In our view, exclusion of these payments from the employees' interim earnings, in the circumstances here, clearly results in a windfall to the employees and a penalty against the Respondent. In all other respects, backpay shall be computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1959), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[2]

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[1]The judge relied on *Roadway Express*, 246 NLRB 174 (1979). We find that case inapposite. *Roadway* involved the issue of whether the Board should have declined to adjudicate alleged unfair labor practices in deference to the parties' private settlement and not the specific issue here of whether, as a matter of the Board's remedy, certain payments to employees properly are offset against backpay. We find it unnecessary to express any view on the Board's holding in *Roadway*.

[2]See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chaim Babad, Bernard Steinmetz, and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., Forest Hills, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Offer Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip, and Hugh Robertson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Board's decision."

Dated, Washington, D.C. 22 January 1985

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-(NY)-83-82
Forest Hills, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

CHAIM BABAD, BERNARD STEINMETZ and EMANUEL STEINMETZ, A Copartnership d/b/a J.R.R. REALTY CO.

and

Case Nos. 29-CA-8809
29-CA-8880

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

*William Shuzman, Esq.*, of Brooklyn, NY, fro the General Counsel.
*Morris Tuchman, Esq.*, *(Gluck & Tuchman)* of New York, NY, for Respondent.
*Ira Sturm, Esq.*, *(Israelson, Manning & Raab, Esqs.)*, of New York, NY, for the Charging Party.

## DECISION

### Statement of the Case

JULIUS COHN, Administrative Law Judge: This proceeding was heard in Brooklyn and New York on March 15 and 16, 1982. Upon charges filed on April 10 and May 8, 1981, the Regional Director for Region 29 issued an Order consolidating cases and

a complaint on August 31, 1981, alleging that J.R.R. Realty Co., herein called Respondent, violated Section 8(a)(1)(3) and (5) of the Act by refusing to recognize and bargain with Local 32B-32J, Service Employees International Union, AFL-CIO, herein called the Union: by by-passing the Union and bargaining directly with employees: and by discharging employees because of their membership in the Union. Respondent filed an answer denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. All parties submitted briefs which have been carefully considered. On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent, also called J.R.R. is a partnership composed of nine individuals, principally Chaim Babad and members of his family, and, in addition, two other partnerships, one composed of Bernard Steinmetz and members of his family, and the other of Emanuel Steinmetz and his immediate relations. J.R.R. owns and operates an apartment building in Forest Hills, Queens, New York, from which it derives gross annual income of $410,000. Respondent contents that inasmuch as it does not receive revenues in excess of $500,000, the Board's standard for asserting jurisdiction over apartment housing,[1] this proceeding should be dismissed for lack of jurisdiction.

However based upon documents stipulated for the record, it appears that Babad, and members of his immediate family, as well as the two Steinmetz families, (Babad being in addition a cousin of the Steinmetz'), are all partners in five other partnerships

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[1] *Karl Gerber, Max Taetle, Nathan Metz, and Estate of Bernard Katz, co-partners d/b/a Parkview Gardens*, 166 NLRB 697.

which together total gross revenues of almost one and a half million dollars. These other partnerships, similarly as does Respondent, own apartment buildings. The record further reveals that Babad is the manager of all the partnerships and buildings, that the addresses of each are the same address as Babad's home, where he maintains the books and records for the partnerships and the buildings they own. As managing agent and partner, Babad controls the daily operations of all the buildings, including labor relations. In the latter connection, it is noted that Babad transferred employees from one of the partnerships to Respondent when, as will be more fully described later, it took over the building which is the subject of this proceeding.

I find, therefore, that the six partnerships are sufficiently interrelated in operations, management, control of labor relations, and in effect function as a single employer. The Board has found in these circumstances, that a number of corporations operating in the apartment housing industry could combine their total gross revenues so as to arrive at a figure of at least $500,000 in receipts which meets the standard set by the Board for jusisdiction.[2] The record further reveals that Respondent purchased fuel oil valued in excess of $30,000 in the year preceeding the issuance of the complaint herein, from enterprises which in turn received such materials in interstate commerce directly from states other than the State of New York. Acordingly, I find that both the statutory requirement and the Board's relevant standard for asserting jurisdiction have been met and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.[3]

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[2]*Arlington Ridge Development Co.*, 203 NLRB 787 (1973).

[3]Alternatively the record reveals that in a State Court proceeding brought by the Union on this matter, Respondent pleaded successfully that the arbitration be stayed since the same issues were brought before the Board. In *Pollack Electric Company*, 219 NLRB 1237 (1975) the Board affirmed a decision by an Administrative Law Judge asserting jurisdiction over a respondent whose business met statutory but not discretionary standards and who had not questioned NLRB jurisdiction before the State Labor Board.

## II. Labor Organization

The Union is a labor organization within the meaning of Section 2 (5) of the Act.

## III. The Alleged Unfair Labor Practices

### A. Facts

The facts are in the main uncontroverted. On March 31, 1981 pursuant to a title closing, Respondent acquired the apartment building on Austin Street in Forest Hills which provides the locale for this proceeding. The building had been owned by Jaru Properties, Inc. and ASCR Realty Co., Inc., and managed by J.A.R. Management Corp., all of said entities being owned by the Rose family. As of the date of the title closing, there were six employees at the building.[4] These employees were represented by the Union in accordance with a collective-bargaining agreement dated August 27, 1979 and effective until April 20, 1982 between J.A.R. Management and the Union.

On November 6, 1980 Jaru Properties, Inc., and ASCR Realty Co., Inc. contracted to sell the property to a corporation named Joshua Estates, Inc. This agreement was executed on behalf of the latter by Harry Newman, as vice president. Newman was the attorney for the Respondent in these transactions, and according to the testimony of Alfred Rose, a principal owner of the seller, the contract closing occurred in the office of his attorney, Maurer, and was attended by Newman and Babad. Rose stated it was understood that the purchasers were Babad and Steinmetz who gave checks totaling $165,000 as a deposit on the sale. Rose also said he had a number of conversations with Babad prior to the signing of the contract relating to financing and the purchase price. The ultimate title closing took place at Rose's attorney's office on March 31, 1981 and once more Babad was present.

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[4]The employees were Ezequiel Correa, building superintendent, Gilberto Concepcion, porter, Curtis Phillip, Hugh Robertson, and Lorenzo Cruz, full-time elevator operators and Charles Darmendo, part-time elevator operator.

The contract of sale provided that the purchaser (Joshua) shall take the property subject to certain "permitted incumbances," and among those specified was the Union contract, a copy of which was annexed to the contract of sale. At the closing on March 31, Joshua Estates, Inc., by Harry Newman executed an assignment of the contract of sale to JRR Realty Co., which was signed and acknowledged by Babad's partner. At the same time the seller assigned to JRR (Respondent), as assignee of Joshua, all rights and title to certain agreements including the 1979 agreement with the Union. Also at the closing, both Joshua and JRR by Babad as partner agreed to take title subject to the payment and performance of all obligations of seller under the leases, contracts and agreements and service and maintenance contracts in effect on March 31, 1981, and further agreed to indemnify the seller and hold it harmless for any claims and liabilities arising on such agreements. Finally, it is noted that the collective-bargaining agreement itself contained a provision requiring that the seller of the building obtained an adoption of the Union contract from the purchaser, and offer continued employment to all unit employees and give the Union two weeks written notice prior to the sale. However it does not appear that the seller complied with these provisions.

Correa, the building superintendent, and Curtis Phillip, the elevator operator on the afternoon shift, both testified that late in the afternoon of April 1, some people came to the building with a moving truck and said they were moving into apartment 3C. They asked Correa for the key which he refused, saying he had no orders to give the key to anybody. About two hours later, approximately 7:00 p.m., Babad came to the premises and told Correa that the new owner is renting that apartment to these people and Correa gave him the key. The people then moved into the apartment. Phillip stated that Babad told him that he is the owner of the building and these people moving in were his men who were going to work there. Babad asked Phillip if he wanted to make a deal to leave his job but the latter said he expected to continue working and was not thinking about any deal. Although Babad offered him $500 to leave, Phillip said he would not do it because he needed the job and pleaded with Babad

to keep him on. Phillip also stated that Babad told him he could not pay what the Union is paying and would not be able to hire him.

Also on this occasion Babad told Correa to contact Gilberto Concepcion because as of that day the porter was out. Concepcion came to Correa's apartment later that evening and Babad offered him $1,000 to make the deal. Concepcion accepted it and then waited until Babad returned around midnight with the money. He gave Concepcion $1,000 in cash for which Concepcion signed a release. That evening Babad also tried to buy out Correa offering him $1400 to leave the Union, the job, and for severance pay. Correa refused stating he was going to call the Union the next day. Babad told him he wanted the Union "off," and would make a deal with him and the porter without the Union.

The next day Correa telephoned and reported what happened to the Union, and Phillip actually visited the Union and informed the delegate. Correa was directed not to sign any papers and not to leave the Union because a representative would be there the day after. Phillip was told to go back to work at 3:00 o'clock but shortly thereafter Babad came to the elevator and informed him that one of the new men would be working the elevator from then on. Phillip said he went to Correa's apartment and Babad came in and took their keys for the boiler room and the elevator key.

The next day Friday, April 3, a Union representative came to the building with a picket sign, and from that point on, the employees picketed the building. All the employees had been replaced by the family who moved into the building on April 1.

A few days later Babad came to Correa's apartment in the building and offered him $2500 to leave his job, and indicated he would give more money to the other employees. He told Correa he would give Phillip $1700 and $700 to the part-timer, Darmendo, and another amount for Cruz. He asked Correa to speak to the others who were then picketing and tell them that Babad was offering a better deal but without the Union which he did not want. Correa did communicate with the other

employees who told him there would be no deal without the Union, and Correa reported their refusal to Babad. In the ensuing weeks, Babad offered Correa money on a number of occasions either by telephone or by person. At one point, Babad threatened Correa, who was still living in the building, with eviction and cutting off his utilities. Babad claimed he did this because the pickets had engaged in some violent actions.

Babad testified that when he took over the building, he brought these new people to the building as described above. He proposed to pay the new superintendent a lump sum from which the latter would take care of the other people who were working with him and were part of his family. Since the previous employees were picketing the building, Babad stated he needed four people to be at the building, but after the strike he retained three, all of whom were brothers, and a fourth person who was the wife of the superintendent. He stated that he intended to automate the elevator but this has not been done yet. Babad further testified that while the picketing was going on about the latter part of April, he received a telephone call from Rudy Larmond, a Union official, and after some discussion an appointment was made to meet on April 27. During the telephone conversations Babad told Larmond that since he was putting in an automatic elevator, there was no need for elevator men and, in addition, the superintendent (Correa), was looking for another job. He concluded there was no sense keeping all the men there and, while he did not have anything against the Union, he had not taken over the contract when he purchased the building. At the meeting, after discussion of these various problems raised by Babad, a settlement agreement was prepared but never signed, and indeed, Babad stated he never read the paper. Basically the agreement provided for a settlement with the employees consisting of a payment of four weeks pay to each of them. Babad stated that the Union said he could talk to the superintendent and work out a private deal with him if he wished, and the amount of four weeks pay to the other people had been left open.

In any case Babad conceded that until the telephone call setting up the meeting and the meeting itself on April 27, he had

not talked to or notified the Union concerning offers of settlement made to the employees, Concepcion, Cruz, Darmendo, Robertson and Phillip. Nor did the Union give permission for Babad to talk or deal with these employees. By the same token before April 27 Babad did not discuss with the Union the problem of dealing with the superintendent Correa.

On April 28 Babad came to the building and asked Correa to communicate with the other employees and shortly thereafter some of them came to Correa's apartment. Babad then gave Concepcion whom he had already paid $1,000, another $150; he gave Darmendo, the part-timer, $850; $1500 to Cruz and struck his deal finally with Correa for the payment of $2500 in addition to three months free rent. The employees agreed to give up rights to their jobs and signed receipts for the money which had been given them by check and then cashed by Babad. According to Curtis Phillip, he and Robertson continued their picketing until April 30 when they decided that it was too lonely and dangerous to continue. Robertson then called Babad and made an appointment and they met at the building with him and the new superintendent. After some negotiation Babad finally offered Phillip $2100, and Robertson $1850, and after endorsing checks they were paid in cash by Babad. In addition they signed receipts as did the other employees before them.

In his testimony Babad maintained that he had never agreed to assume the contract and consequently he did not abide by any of the terms and conditions of employment set forth therein. His new superintendent did the work of the porter and consequently Babad no longer employed anyone in that latter capacity. The three elevator men whom Babad employed to replace the former employees were reduced to two shortly after taking over the building. Moreover clearly Babad did not negotiate any of the terms and conditions of employment of his new employees with the Union, and as noted, he has reduced the number of employees, and those that remain are paid less than the Union contract rates, and finally, as of the time of the hearing, the elevator had not been automated, the reason asserted for not hiring the former elevator operators.

## B. Discussion and Analysis

### 1. The Successorship Issue

In *N.L.R.B. v. William J. Burns International Securities Services, Inc.*, 406 U.S. 272 (1972), the Supreme Court affirmed the Board's successor-employer doctrine, finding that a successor-employer, absent a reasonably based good-faith doubt of the incumbent union's majority, is obligated to recognize the continuing representative status of the bargaining agent of its predecessor's employees in an appropriate unit taken over from the predecessor. This is applied not only where the union's status was established by Board certification but also where it had been established by voluntary recognition.[5]

In the instant case, Respondent continued the same business as its predecessor, that is, the ownership and operation of a residential apartment building. However, an essential factor in the determination of successorship is absent as Respondent did not continue at least a majority of the employees of the predecessor in its work force. Indeed Respondent immediately replaced the predecessor's employees with a family of employees that Babad transferred from one of his apartment house operations at another location. Nevertheless Respondent's obligation to recognize and bargain with the Union and even more, to honor the contract is founded on another ground. In *N.L.R.B.* v. *Pine Valley Division of Ethan Allen, Inc.*, 544 F.2nd 742 (4th Cir. 1976), the Court enforced a Board Order finding there had been an adoption by the successor of the contract.

In the instant case the assumption of the collective-bargaining agrrement by Respondent may be spelled out from the series of not unusual real estate transactions and documents described and set forth above. The contract of sale was executed by Newman, Respondent's attorney, as vice president of Joshua Estates, Inc., undoubtedly a dummy corporation, acting on behalf of Babad

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[5] *Virginia Sportswear, Inc.*, 226 NLRB 1296, 1300 (1976).

who incidently was present at this and all of the other transactions. The contract specifically provided that the purchaser take title subject to, among other things, Union contracts, a copy of the collective-bargaining agreement even being annexed thereto. At the title closing on March 31, Joshua, again by Newman, assigned the contract of sale to Respondent, an assignment acknowledged by Babad, in which Joshua assigned all rights of the purchaser to Respondent as assignee, which assumed all obligations of the purchaser under the original contract with the seller. Finally at the closing both Joshua and JRR, the Respondent, agreed to take title subject to all existing leases, contracts, agreements, service and maintenance contracts then in effect. By these undertakings and assumptions, Respondent succeeded the seller of the building with respect to obligations under the collective-bargaining agreement.

In his testimony, Babad apparently chose to ignore his own written assumptions and indemnifications concerning the labor agreement, and preferred to remark on the sellers' alleged failure to abide by the collective-bargaining provision requiring it to notify the Union of the impending sale. I find in all the circumstances that Respondent by its failure to recognize the Union, and assume all the obligations under the collective-bargaining agreement relating to the Union itself and the employees who were employed at the time of his takeover, violated Section 8(a)(5) and (1) of the Act.[6]

Turning back to the question of successorship and the principles established in *Burns, supra*, it has been noted above that all factors for the finding of a successorship are present herein except for the failure of Respondent to retain the former employees at the apartment building. The Board has stated "it is well settled that successorship will be found in such cir-

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[6]The Union's letter dated April 23, 1981 addressed to Respondent does not militate against this finding. While the letter appears to be simply a request that Respondent, as an ordinary successor, agree to be bound by the collective-bargaining agreement with its predecessor, it is clear that the Union had no knowledge at that time of the express assumption of the collective-bargaining agreement by Respondent.

cumstances if the new owner fails to hire the predecessor's employees because of their affiliation with the Union."[7] The issue then is whether the employees were not hired for unlawful discriminatory motives.

After closing title to the building on March 31, Babad, on behalf of Respondent, went to the building on April 1. At the time superintendent Correa was there inasmuch as he lived in an apartment in the building, and employee Phillip was working on the elevator. That day Babad replaced them with a family of employees whom he transferred from another building he managed in Brooklyn. The remainder of the employees were advised that they no longer had jobs. Actually whether the employees were discharged or refused hire by Respondent, the result is the same. The uncontradicted testimony of Phillip, an elevator operator, was to the effect that during the course of his conversation on April 1 with Babad, the latter stated he could not pay the Union rates and therefore he would not be able to hire Phillip, who, at the time, was actually pleading for his job. In reality Babad attempted to make some sort of deal with Phillip whereby for a certain sum of money he would relieve himself of the obligations which he knew were part of the Union contract such as severance pay and the like. As a result he went through this routine either himself or through Correa with all of the old employees. It was implicit in his course of conduct that the reason he was trying to "buy out" these former employees was his desire not to retain them under the Union agreement. Indeed Babad paid some of these employees sums in excess of what would have been severance pay und. the terms of the Union contract. Clearly Babad was aware of what he was doing. As a bona-fide purchaser and successor to the former employer, Respondent would have no obligation to retain the employees, consequently it had no need to pay money in lieu of severance pay or for any other reason to these employees. The only logical purpose of these payments was to strike a deal with individual employees so that they would forego not only the Union, but also their jobs and he could start

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[7] *Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979).

afresh with is own crew. Finally Babad's claim throughout the proceeding, that he had no need for the elevator operators in view of his plan to automate the elevator as soon as he took over the building, was pretextual. The hearing in this matter was conducted almost a year after Respondent took title to the building and the elevator was still not automated. In these circumstances, I find that Respondent violated Section 8(a)(3) of the Act by refusing to hire the former employees of J.A.R.

I further conclude that but for the unlawful conduct in failing to hire these employees, the Union's majority status as collective bargaining representative would have continued following the takeover and Respondent's obligation to recognize and bargain with the Union as a successor would have also continued. By its conduct in refusing to recognize and bargain with the Union as representative of the employees, I further find that Respondent violated Section 8(a)(1) and (5) of the Act.[8]

2. The By-passing Issue

General Counsel alleges that Respondent further violated Section 8(a)(1) and (5) of the Act by dealing individually with employees and thereby by-passing the Union as their collective bargaining representative.

(a) The Status of Correa

Preliminary to the discussion of this issue, it is necessary to determine whether Correa was an employee or a supervisor within the meaning of the Act. Correa had been superintendent since 1977, approximately four years before the building was sold to Respondent, and as such was within the bargaining unit described in the collective-bargaining agreement between the Union and J.A.R. As building superintendent he was mainly concerned with the general maintenance of the building including checking the boiler, and making minor repairs. He also checked employees coming in to work, but if someone called in sick he

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[8] *Burns, supra; Love's Barbeque Restaurant No. 2, supra.* The appropriate unit is: all service employees of Respondent, employed at its Forest Hills apartment building, exclusive of all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

he would call J.A.R. Management and inform them of this circumstance. Correa was paid about $25 above the stipulated contract rate for a building superintendent, but he explained that this was in payment for extra work which he was called upon to do. In addition his compensation included free rent for an apartment and utilities such as a telephone. Correa testified that during his tenure he had never hired anyone for a job except the porter, Concepcion, nor had he ever interviewed anyone for a job. Moreover the other employees had been employed prior to the time he started in 1977 and there was no occasion to discharge any of them. Correa state that on the one occasion when he hired the porter, he merely told Concepcion what his work duties were and that was it. He did state that if an employee wanted an off day, he would tell him whether he could take it or not. Further Correa said he never suspended any employee or even issued a warning. Correa said under the established policy, if an elevator man for the midnight shift called in sick, nobody would run it. However if there was an absentee for an elevator on another shift, he would run it himself for a while or ask others to do it, but often they would refuse if they had thier own shift or for any other reason. Sometimes at his request another operator would take over the shift in order to obtain overtime pay. Finally Correa stated that a representative of his employer, J.A.R. Management, would come to the building once a week and inspect what was going on.

On the basis of the foregoing I find that the superintendent, Correa, is not a supervisor within the meaning of the Act but is more in the nature of an experienced, senior employee who routinely oversees the maintenance of the building, and is subject to regular and constant higher supervision.[9] In this connection it is also noted that the elevator operators' jobs are unchanged and require no particular further instruction or assignment, and the porter had a similar position, merely repeating the tasks and duties he was told to perform when hired.

The General Counsel and Charging Party have alleged, alternatively, that Correa is an agent of Respondent whose statements

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[9]See *The Washington Post Company*, 254 NLRB 168 (1981); *Peat Manufacturing Company*, 251 NLRB 1117 (1980).

and conduct would be binding upon it. This is clearly evidenced in the instant case by reason of Babad having asked Correa to approach employees and make offers of settlement to them. This was done at the outset since Correa transmitted, on behalf of Respondent, all of Babad's offers to Concepcion and to other employees on other occasions. Since Correa actually spoke to the former employees of J.A.R. and offered to them specific sums of money, proposals acted upon by Babad, the employees could reasonably believe that Correa was acting on behalf of and as a conduit for Respondent, and accordingly I find him to have been an agent of Respondent.[10]

(b) The By-passing

The uncontraverted evidence is to the effect that Babad, either by his own efforts or through Correa dealt with the employees, communicated offers of settlement of their status as employees and negotiated severance pay. Babad either by himself or through Correa, engaged in this conduct without permission of the Union, the collective bargaining representative of the employees. Indeed Babad ultimately reached agreements with all the employees, including Correa, and paid sums of money and obtained signed receipts from them. As to Correa, Babad also made numerous attempts to make a deal with him and since Correa was a member of the bargaining unit, Babad also by-passed the Union in his case, at least until April 27 when he received permission from the Union to deal with him. However no such permission was granted as to the other employees with whom Babad made a final "settlement" after the meeting, again without notifying the Union or obtaining any authorization to do so.

It has been established that it is the duty of an employer to bargain soley with the statutory representative and no other person or group. [11] Respondent acted in deregation of this principle

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[10] *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980).
[11] *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678 (1944).

when on April 1 and thereafter Babad or Correa began discussions individually with employees concerning an attempt to have them voluntarily leave their positions for which they would be reimbursed. In his effort to rid himself of the Union, Babad actually paid them perhaps more than they would have been entitled under the severance pay provisions of the collective-bargaining agreement. This by-passing of the Union and dealing on these matters directly with the employees further violated Section 8(a)(5) of the Act.[12]

3. The Alleged Violations of Section 8(a)(3) of the Act

In the circumstances of this case in order to establish that Respondent was a successor to the former owner of the apartment building, it was necessary, and I found that Respondent violated Section 8(a)(1) and (3) of the Act by refusing employment to the employees of J.A.R. In addition since I have found that Correa was not a supervisor within the meaning of the Act, but rather was an employee, I find further that he was also subject to Respondent's discrimination in violation of Section 8(a)(1) and (3) of the Act. In sum as previously stated I find that Respondent failed to offer employment to Correa, concepcion, Cruz, Darmendo, Phillip and Robertson, in violation of Section 8(a)(3) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist there-from and to take certain affirmative action designed to effectuate the policies of the Act.

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[12] *D & H Manufacturing Co.*, 239 NLRB 393, 404 (1978).

Having found that Respondent as a successor-employer, violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the collective bargaining representative of the employees in the unit found appropriate herein. I recommend that Respondent be ordered to recognize and bargain in good faith with the Union.

I have further found that as a result of its contractual undertakings in the course of the closing of title to the apartment building it had purchased, Respondent had adopted the collective-bargaining agreement between the Union and its predecessor, J.A.R., which it then repudiated, and discharged or refused to hire the employees of the predecessor on and after April 1. Accordingly, I shall recommend that Respondent make whole the discharged employees in the unit found appropriate herein, from April 1, 1981 in accordance with the terms and conditions of employment set forth in the contract repudiated by Respondent. This remedy is not limited to the end of the contract term since the obligation to bargain continues after the expiration of the agreement.

Having found Respondent discharged Correa, Concepcion, Cruz, Darmendo, Phillip and Robertson, in violation of Section 8(a)(1) and (3) of the Act, I recommend that Respondent be ordered to offer them reinstatement and to make them whole for any loss of earnings and other benefits resulting from their discharge. The amount of backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1959), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[13] In making whole the employees for their loss of earnings and other benefits, Respondent should not be credited with the amounts it paid to the employees allegedly in settlement of their claims for severance pay, as these payments were made in violation of Section 8(a)(3) of the Act, and constituted bribes to the employees for the purposes of their renouncing their ties with the Union and leaving

[13]See generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

their jobs. Nor do I find merit in the contention of Respondent that these payments resulted from voluntary settlement agreements and receipts signed by the individual employees. The agreements were not really voluntary since it was clear from the evidence that the employees desired continued employment and were forced to take these amounts as an alternative. The Board has not normally refrained from adjudicating unfair labor practices because of private settlement agreements. Particularly in the situation where the agreements in themselves were violative of the Act, I find it would not effectuate the policies of the Act to give effect to and credit the settlements made by Respondent.[14]

Because of the egregious nature of the violations herein, including discharge or refusal to hire the entire complement of the predecessor's employees, I shall recommend entry of a broad order.[15]

### Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the collective bargaining representative of the employees in the following unit found appropriate herein: All service employees of Respondent, employed at its Forest Hills apartment building, exclusive of all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

4. Respondent is the successor-employer to J.A.R., the former employer at the apartment building involved herein.

5. Respondent violated Section 8(a)(5) and (1) by refusing to bargain, After April 1, 1981 collectively in good faith with the

---

[14]See *Roadway Express, Inc.*, 246 NLRB 174 (1979).

[15]See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Union as the exclusive bargaining representative of the employees in the unit found appropriate herein.

6. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to honor the collective-bargaining agreement then in effect, and by its discharge of all of the former employees at the apartment building.

7. Respondent violated Section 8(a)(5) and (1) of the Act by bargaining directly with the building service employees and bypassing the Union.

8. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ezequiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip, and Hugh Robertson, because of their membership in and support of the Union.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[16]

Respondent Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership, d/b/a J.R.R. Realty Co., a co-partnership, its partners, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with respect to wages, hours, and other terms and conditions of

---

[16]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

employment with Local 32B-32J, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the unit described above as appropriate herein.

(b) Refusing to honor and abide by the contract entered into between its predecessor J.A.R. Management Corp., and the Union, for the period from April 1, 1981.

(c) Disregarding the Union and bargaining directly with the employees in derogation of their bargaining representative.

(d) Discharging employees because of their membership in or support for the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Bargain collectively, upon request, with the above named Union as the exclusive representative of the employees in the appropriate unit.

(b) Honor, and give retroactive effect from April 1, 1981, to the terms and conditions of the collective bargaining contract with the Union, including payment of wages and benefits as prescribed.

(c) Offer Ezequiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip and Hugh Robertson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the section of this decision entitled "The Remedy."

(d) Preserve, and, upon request, make available to the Board or its agents for examination and copying, all personnel records,

social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the backpay due. Post at the Forest Hills, Queens, New York apartment building copies of the attached notice marked "Appendix."[16] Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily placed. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 3, 1982.

/s/ Julius Cohn

Julius Cohn
Administrative Law Judge

[16]In the event that this Order is enforce by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Supreme Court, U.S.
FILED
SEP 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2167

# In the Supreme Court of the United States

OCTOBER TERM, 1986

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held that the National Labor Relations Board was not collaterally estopped from finding that petitioner had assumed its predecessor's collective bargaining agreement.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No. 85-2167

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 785 F.2d 46. The decision and order of the National Labor Relations Board (Pet. App. A11-A33) are reported at 273 N.L.R.B. 1523.

### JURISDICTION

The judgment of the court of appeals was entered on March 4, 1986. A petition for rehearing was denied on April 8, 1986. The petition for a writ of certiorari was filed on July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, a partnership doing business as J.R.R. Realty Co., purchased an apartment building in Queens, New York, which was owned by JARU Properties, Inc., and ASCR Realty, Inc., and managed by J.A.R. Management Corp. (J.A.R.). J.A.R. had entered into a collective bargaining agreement with Local 32B-32J, Service Employees International Union, AFL-CIO, covering the six service employees who worked at the apartment building. Pet. App. A17. The collective bargaining agreement contained a provision stating that if J.A.R. sold the apartment building it would, as a condition of sale, require the purchaser to agree in writing to adopt the agreement and to offer employment to all of the service employees (*id.* at A3).

The sale contract between the prior owners and petitioner's nominee, Joshua Estates, provided that the purchaser would take title subject to certain "permitted encumbrances," including "union contracts." The collective agreement between the union and J.A.R. was listed as such an encumbrance, and a copy of the agreement was attached to the sale contract. At the title closing, Joshua Estates executed an assignment of the sale contract to petitioner. At the same time, the former owners and J.A.R. specifically assigned to petitioner their rights and obligations under the collective bargaining agreement between J.A.R. and the union. Pet. App. A3-A4.[1]

On April 1, 1981, the day following the closing of title on the apartment building, petitioner's partner, Chaim Babad, came to the building and announced that the six employees

---

[1]Joshua Estates and petitioner also executed an indemnity agreement providing that title to the building was subject to all obligations of the sellers under the leases, contracts, and agreements in effect on the closing date, and that petitioner would hold the sellers harmless from any claims and liabilities arising thereunder (Pet. App. A4).

formerly employed by J.A.R. were discharged as of that day. Babad offered those employees money to give up their jobs, informing them that he could not pay union wages and that he wanted to deal with them rather than the union. Babad threatened to cut off one employee's utilities and evict him from the building if he did not accept the offer. Ultimately all of the employees agreed to petitioner's demands. Pet. App. A4-A5, A18-A21.

2. The union filed charges with the National Labor Relations Board alleging that petitioner had unlawfully refused to recognize and bargain with it, had negotiated individually with the employees, and had discharged them because of their union membership. The union also filed in state court a notice of intention to arbitrate against petitioner and J.A.R. (Pet. App. A5 n.3, A16 n.3). The New York Supreme Court granted petitioner's motion to vacate the arbitration notice, finding that petitioner had not agreed to submit to arbitration and that, in any event, the state court was deprived of jurisdiction because of the pending unfair labor practice proceeding.[2] The New York Supreme Court,

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[2]The memorandum decision of the New York Supreme Court states in its entirety (citations omitted):

> This is a motion by petitioners for a judgment vacating the annexed notice of intention to arbitrate.
>
> The movant does not deny that it is the successor in interest to J.A.R. Management Corp. There is nothing before this court to indicate that J.R.R. Realty Co. was a signator of the agreement of collective bargaining, nor is there an indication in writing that J.R.R. Realty Co. had agreed with J.A.R. Management Corp., its predecessor in interest, to adopt the provision of the agreement between J.A.R. and Local 32B-32J, Service Employees International Union ("Union").
>
> The law is clear and cases are legion that no one is under a duty to submit to arbitration unless by clear language he has so agreed. Moreover, as herein indicated, the Union submitted the same issue of unfair labor practice to the National Labor Relations

Appellate Division, affirmed the order vacating the notice as to petitioner. *J.A.R. Management Corp.* v. *Sweeney*, 86 A.D.2d 596, 446 N.Y.S.2d 193 (1982).[3]

In the unfair labor practice proceeding, the Board found, in agreement with the administrative law judge, that petitioner violated Section 8(a)(3) and (1) of the Act (29 U.S.C. 158(a)(3) and (1)) by discharging all of the service employees formerly employed by J.A.R. because of their membership in and support of the union (Pet. App. A25, A28). The Board also found, in agreement with the administrative law judge, that petitioner was a successor employer to J.A.R. and, as such, violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by refusing to bargain with the union as the representative of the building services employees; by bargaining directly with the building services employees and bypassing the union; by refusing to honor the collective bargaining agreement between J.A.R. and the union, which the Board found petitioner had adopted; and by discharging all of the building service employees in

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Board. Accordingly, a State court is deprived of jurisdiction over the matter and the Union may not obtain arbitration on the same question.

Accordingly, the motion is granted. Settle judgment.

[3]The Appellate Division stayed the arbitration, pending disposition of the unfair labor practice proceeding, as to J.A.R. The court stated (446 N.Y.S.2d at 194, (citations omitted)):

> While it is true that an NLRB proceeding ordinarily preempts an arbitration proceeding, in this case, the NLRB cannot provide the union with relief against J.A.R. At best, the labor relations disposition will resolve the merits of the union's claims against J.R.R., including the latter's contention that it is not bound by J.A.R.'s contract with the union. The NLRB, however, cannot resolve the union's claims against J.A.R. for failing to give notice, nor can it provide relief against J.A.R. should it determine that the contract of sale did not bind J.A.R. to the terms of the collective bargaining agreement.

violation of the collective bargaining agreement between J.A.R. and the union (Pet. App. A22-A25, A27-A28).

In finding that petitioner had adopted the collective bargaining agreement, the Board noted that the contract of sale specifically provided that the purchaser took subject to that agreement, that petitioner had assumed all obligations of the purchaser under the contract of sale, and that petitioner agreed to take title subject to existing contracts then in effect. The Board concluded that "[b]y these undertakings and assumptions, [petitioner] succeeded the seller of the building with respect to obligations under the collective bargaining agreement" (Pet. App. A23).

3. The court of appeals upheld the Board's decision (Pet. App. A7), finding it to be supported by substantial evidence. The court rejected petitioner's contention that the Board was collaterally estopped from finding that petitioner assumed the collective bargaining agreement because the New York Supreme Court had found that petitioner did not agree to adopt that contract. Noting that "[c]ollateral estoppel does not apply to issues that were not 'essential to the judgment[,]' " the court pointed out that the New York courts found only that petitioner was not bound by the arbitration provision of the contract and "did not decide, and did not need to decide, whether [petitioner] was bound by the *other* provisions of the labor contract." *Id.* at A6 n.4 (emphasis in original).

## ARGUMENT

Petitioner contends (Pet. 13-50) that the Board, upheld by the court of appeals, erred in finding that petitioner assumed J.A.R.'s collective bargaining agreement. In petitioner's view, collateral estoppel effect should have been given to the decision of the New York Supreme Court which, according to petitioner, determined that petitioner had not assumed the collective bargaining agreement. That

contention does not warrant review by this Court, and, in any event, is without merit.[4]

Petitioner does not dispute (Pet. 47) that collateral estoppel applies only when "an issue is actually and necessarily determined" in the prior proceeding. *Montana* v. *United States*, 440 U.S. 147, 153 (1979); accord, *Allbritton Communications Co.* v. *NLRB*, 766 F.2d 812, 820 (3d Cir. 1985), cert. denied, No. 85-666 (Jan. 21, 1986). Rather, petitioner challenges the conclusion of the court of appeals that the New York courts did not determine the contract assumption question. That issue, which involves only the proper characterization of the opinions of the New York state courts, does not warrant consideration by this Court.[5]

In any event, there is no merit to petitioner's contention that the Board was estopped from finding that petitioner is bound by the collective bargaining agreement. The New York Supreme Court granted petitioner's motion to vacate the arbitration notice in order to defer to the Board's resolution of the very issue that petitioner contends the court

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[4]Petitioner also contends (Pet. 50-52), citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that the court of appeals erred in not remanding the case to the Board for initial determination of the collateral estoppel issue. That contention has no merit. *Chenery* did not disturb the settled rule that a decision of a lower court or administrative agency "must be affirmed if the result is correct" based upon grounds other than those relied on by the agency but which the reviewing court can itself determine are correct (*id.* at 88).

[5]Because this petition involves only the question whether collateral estoppel effect should be given to the supposed conclusion of the New York courts that petitioner did not assume the collective bargaining agreement, and not whether petitioner is a successor employer, there is no reason to hold this case for disposition in light of *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208. That case involves the question whether the Board correctly determined that an employer was a successor employer that had a duty to bargain with the union that represented its predecessor's employees.

decided. And the Appellate Division expressly noted that the proceeding before the Board "will resolve the merits of the union's claims against [petitioner], including the latter's contention that it is not bound by J.A.R.'s contract with the Union" (446 N.Y.S.2d at 194 (see note 3, *supra*)). Moreover, as the court of appeals stated (Pet. App. A6 n.4), to the extent that the New York courts resolved any substantive issue, they resolved only the application of the arbitration clause to petitioner.[6]

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[6]In addition, the Board was not a party to, nor did it control, the state court litigation. Accordingly, it is not clear that it would be bound by the determinations of those courts in any event. *Montana*, 440 U.S. at 153, 155; see *United States* v. *East Baton Rouge Parish School Board*, 594 F.2d 56, 58 (5th Cir. 1979); cf. *United States* v. *Mendoza*, 464 U.S. 154 (1984). But compare *NLRB* v. *Heyman*, 541 F. 2d 796, 800 (9th Cir. 1976), with *Peninsula Shipbuilders' Association* v. *NLRB*, 663 F.2d 488, 492 (4th Cir. 1981), and see *Allbritton Communications Co.*, 271 N.L.R.B. 201, 202 n.4 (1984), enforced, 766 F.2d 812 (3d Cir. 1985). The court of appeals did not consider whether the Board would not be bound by the state courts' determinations because it was not a party to the state court litigation, and no question concerning that issue is presented here.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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No. 85-2167

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, a co-partnership d/b/a J.R.R. REALTY CO.,

*Appellant,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR INTERVENOR, LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION

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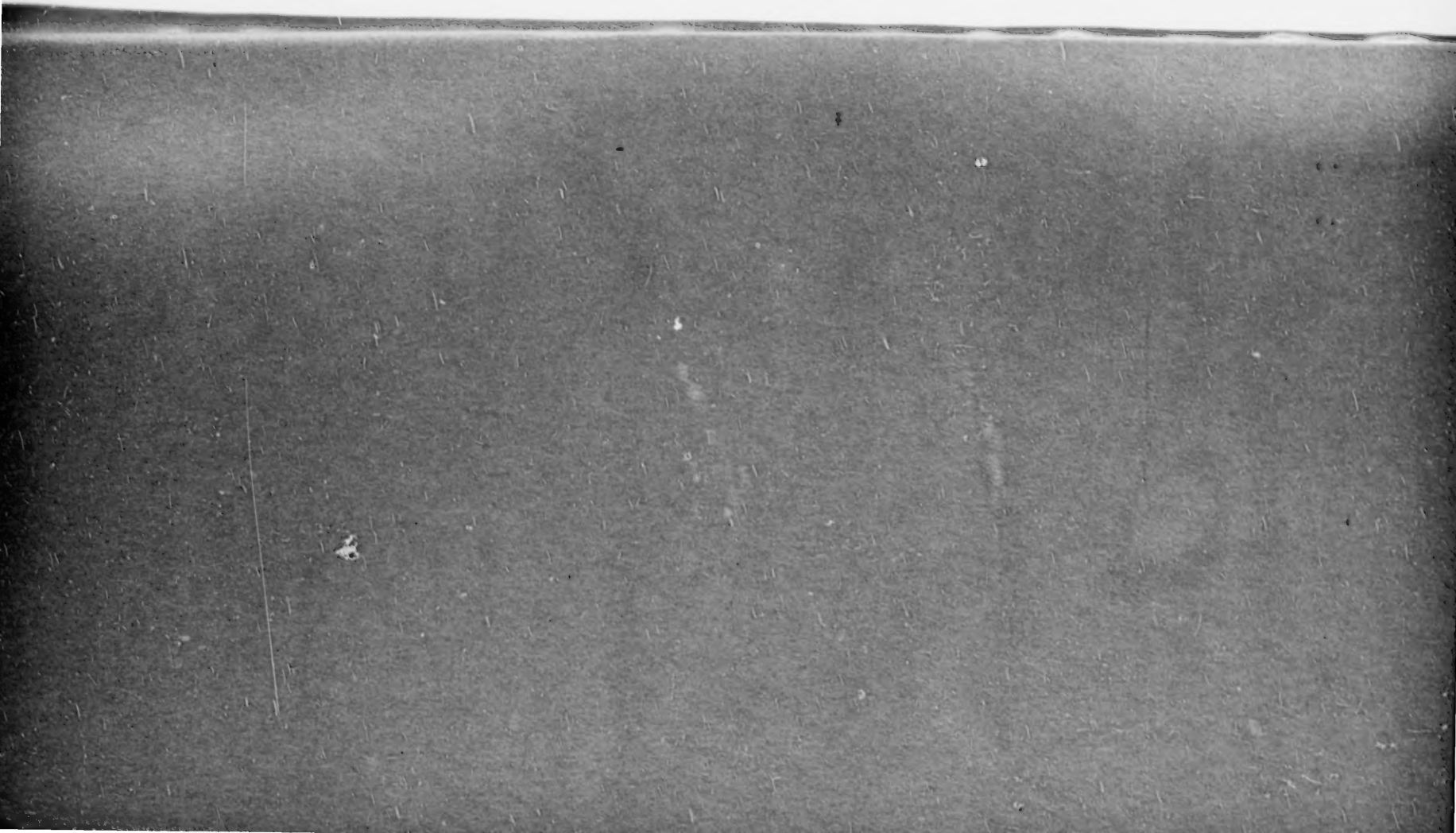

## QUESTION PRESENTED

Whether the National Labor Relations Board properly found in the circumstances that a successor employer assumed its predecessor's collective bargaining agreement and that it violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. 158 (a)(1), (3) and (5), by refusing to retain the employees of the predecessor, by refusing to honor the collective bargaining agreement of its predecessor and by refusing to recognize and bargain with the union

that had represented the predecessor's employees.[1]

---

[1]Local 32B-32J, Service Employees International Union, AFL-CIO, herein called the Union, as a party to the proceeding in the court from which judgment is being taken, files this Brief in Opposition.

## OPINIONS BELOW

The opinion of the United States Court of Appeals below, Docket No. 85-2167, is reported at ___F2 ____. It is appended as Appendix "A" to J.R.R.'s Petition for Writ of Certiorari. That opinion enforced an Order of the National Labor Relations Board (hereinafter "NLRB").

The opinion of the NLRB below is reported at 273 NLRB No. 189 (1985). Said Order adopted the findings of the Board's Administrative Law Judge (hereinafter ("ALJ"). Both opinions are appended as Appendix "B" to J.R.R.'s Petition to Writ of Certiorari.

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## JURISDICTION

The judgment of the Court of Appeals (Pet. App. A1) was entered on March 4, 1986. The Petition for a writ of certiorari was filed in the last week of June, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

## STATUTES

29 U.S.C. 157:

> Sec. 7. Employes shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall so have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. 158(a)(1)(3) and (5)

> Sec. 8. (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the

exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of emplyment or any term or condition of emplyment to encourage or discourage membership in any labor organization: Provided that nothing in this Act, or in any other statute of the United States, shall preclulde an employer from making an agreement with a labor organization (not established, maintained, or aassisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective bargaining unit covered by such

agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable ground for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (b) if he has reasonable grounds for belieiving that membership was denied or terminated for reasons other than the failure of the emplyee to tender the periodic dues and the initiation fees uniformly

reqeuired as a
condition of acquiring
or retaining
membership;

(5) to refuse to bargin
collectively with the
representative of his
employees, subject to
the provisions of
section 9(a).

## STATEMENT

Historically, the Union represented the building service employees employed at an apartment building located at 73-37 Austin Street in Forest Hills, Queens, New York. The employer who owned the building prior to the Petitioner, J.R.R. Realty Co., herein J.R.R., was party to a collective bargaining agreement with the Union. The agreement was dated August 27, 1979 and was to remain in effect until April 20, 1982 and thereafter until such time as the parties negotiated a successor collective bargaining agreement. The collective bargaining agreement was between an entity J.A.R. Management and the Union.

On November 6, 1980, the prior owner contracted to sell the

property at 73-37 Austin Street to an entity Joshua Estates Inc. This agreement was executed on behalf of Joshua Estates by Harry Newman, its Vice President. Newman was the attorney for the J.R.R. in these transactions and according to Newman he was acting merely as the nominee for the J.R.R. in connection with J.R.R's purchase of the premises.

Although J.R.R. contends that there was no assumption of the Union collective bargaining agreement by the purchaser of the premises, the written documents entered into between the Seller and J.R.R., or its nominee, Joshua Estates, Inc.,established to the contrary. Thus, in the contract of sale dated November 6, 1980 the parties agreed:

"Those service, maintenance, employment, Union contracts and concessionaire contracts and agreements identified in Schedule B and in effect on the Closing Date (Seller shall pay all wages, fees and amounts due and payable under all of said contract and agreements to the Closing Date, except those items to be apportioned at Closing pursuant to paragraph below); annexed hereto as schedule B and a listing of said contracts and agreements, which Seller represents are the only ones in effect, and copies thereof are being furnished to Purchaser or attached hereto."

The above proviso is preceded by the following language "the property is sold and will be conveyed, the Purchaser shall take same subject to the following Permitted Encumbrances."

Further on in the contract of sale, in a separate paragraph not related to this so-called "subject to" language, is the following provision:

"Purchaser acknowledged having examined and hereby approves the leases, service and maintenance contracts and agreements effecting the Property on the date hereof. At the Closing of title Purchaser shall execute and deliver to Seller an instrument under which Purchaser shall agree to take title subject to the payment and performance of all obligations of Seller under such leases, contracts and agreements or replacements thereof and new service and maintenance contracts then in effect. (As herein permitted) that arise on or after the Closing Date and shall further agree to idenmnify and hold Seller harmless against any and all claims and liabilities arising under such leases, contracts and agreements or said replacements thereof or new contracts that relate to matters or events occurring from and after the closing of title."

The contract of sale also included a provision for the apportionment and adjustment of employee wages, bonuses, vacations,

severance pay, pension and welfare benefits and other obligations payable to the emplyees by reason of the employment at the premises which would be apportioned as of the date of actual title closing. The contract of sale provided further that the Seller would represent that the full compensation of the employees regularly employed in conneciton with the operation of the premises was to be set forth on the payroll schedule. This schedule included union and welfare benefits, as well as vacation pay allowances. The contract of sale provided that at the closing the Seller would deliver to the purchaser all transferable service and maintenance contracts, employment agreements and other contracts listed in Schedule B.

In another reference to the Union contract, the contract of sale provided that the Seller represented to J.R.R. that the Union contract was not in default and would not be in default on the closing date. It is emphasized that notwithstanding the reference to the Union and the assumption of the Union contract as summarized above, in Schedule B, there was attached an actual copy of the Union contract.

Notwithstanding the language references to the Union contract and the contract of sale there were further discussions and documents signed at the closing of title relating to the assumption of the Union contract by J.R.R. In this regard at the closing of title on March 31, 1981 an assignment of contract of sale was executed by Harry Newman, the Vice

President of Joshua Estates, Inc., the nominee of the J.R.R.. This document provided for the transfer and assignment of all right, title and interest of Joshua to J.R.R. concerning the premises at 73-37 Austin Street. Thus, on paper we have seen that Joshua Estates and J.R.R. are nothing more than the identical entity.

An assignment was executed by the seller of the property assigned to J.R.R. all right, title and interest with regard to the Union contract. Additionally, an indemnity agreement was signed by Joshua Estates and J.R.R. Realty Company wherein both of them agree to take title to the premises "subject to the payment and performance of all obligations of Seller under the leases, contracts and agreements and

service and maintenance contracts in effect on March 31, 1981..."

In J.R.R.'s appeal it asserts that the language "subject to" does not mean that which it obviously means. However, a review of the record will establish that at no time was any evidence introduced that would support a conclusion that those words mean what J.R.R.'s counsel asserts them to mean. Specifically, attorney Newman, who represented J.R.R. in connection with the purchase of the property was fully aware of the intricacies of the sale and was party to the contract of sale. However, at no time was he called to testify on behalf of J.R.R. in support of its convoluted concepts of what the words "subject to" actually mean. It must be assumed that Newman would not have testified in the manner as is being

asserted by J.R.R. in connection with the instant appeal.

J.R.R. now asserts that the Board is collatearlly estopped from finding an assumption of the union contract due to the fact that the identical issue was presented for resolution before the New York Supreme Court and that the Court has concluded that no such assumption had been accomplished. Respondent is being intellectually dishonest in presenting this argument to this Court. Specifically, the decision of the Appellate Division of the New York Surpeme Court in overruling and reversing the Lower Court's stay of an arbitration stated:

> "Petitioners (J.R.R.) then moved to vacate the notice of intention to arbitrate arguing that the matter had been preempted by the NLRB proceeding.

> Special Term granted the motion; we conclude that there should be a modification."
>
> "While it is true that an NLRB proceeding ordinarily preempts an arbitration proceeding (See Matter of Bucholz, [Local 463], 15 A.D.2d 394, 244 N.Y.S.2d 638, aff'd 15 N.Y.2d 181, 257 N.Y.S.2d 134, 205 N.E.2d 282 (N.Y. Ct. App. 1965), in this case the NLRB cannot provide the union with relief against J.A.R. At best, the labor relations disposition will resolve the merits of the union's claims against J.R.R., including the latters contention that it is not bound by J.A.R.'s contract with the Union."

Thus, where J.R.R. at Page 8 of its petition, summarizes the New York proceeding, it is intentionally misleading the Court concerning the ultimate disposition of the matter before the Appellate Division. The Appellate Division, as has been demonstrated, specifically found that

it would not decide the question of J.R.R.'s being bound to the Union agreement specifically for the reason that that issue had been presented to the Board and it would be the Board which would make a determination concerning assumption. J.R.R.'s assertions in its brief that the Appellate Division did not reverse the lower court's decision is grossly inaccurate. The Appellate Division specifically concluded that the issue of assumption as regarding J.R.R. would be left for the NLRB's determination.

Not only is J.R.R. misstating the holdings of the Appellate Division, but it is in total contradiciton to the position that it took before the various courts in connection with its petition to stay the arbitration. Thus, in its memorandum of law

submitted to the Supreme Court before Special Term Part 1, J.R.R. affirmatively argued that the precise question that is presented to the Court is preempted by the National Labor Relations Act. J.R.R. submitted an eight page brief with numerous attachments arguing in support of its application to stay arbitration based on the argument that the issue should be decided by the National Labor Relations Board.

## ARGUMENT

The decision of the Court of Appeals correctly applied settled legal principles to the particular facts of this case and does not conflict with any decision of this Court or of any other Court of Appeals. Accordingly, review by this Court is not warranted.

1. Petitioner challenges the Board's failure to grant full faith and credit to a New York State Supreme Court decision staying an arbitration involving the same parties, which Petitioner asserts constituted a final determination of the non-existence of a valid collective bargaining agreement between it and the intervenor.

The record clearly and unequivocably warrants a finding that the Supreme Court of the State of New York did not make a finding vis a vis

J.R.R.'s assumption of the contract. Although the lower court indicated that there was insufficient evidence that J.R.R. agreed to adopt the Union contract, the Court concluded that the NLRB was to dispose of the issue. On appeal, the Appellate Division refused to decide the merits and affirmatively concluded that identical issue had been presented for disposition before the Board and should be disposed of only by the Board so as to avoid the potential for inconsistent determinations. The Court held,

> "...the labor relations disposition will resolve the merits of the union's claims against J.R.R., including the latter's contention that it is not bound by J.A.R.'s contract with the union."

Accordingly, it is difficult to comprehend the logic of J.R.R.'s argument that the New York Court case

concluded that no agreement had been assumed and that the Union would therefore be collaterally estopped from raising the matter before the Board.

The cases cited by J.R.R. on the question of estoppel are therefore irrelevant. The premise relied upon in support of J.R.R.'s argument is a frivolous one, which seeks only to harass and delay in the ultimate disposition of the enforcement of this proceeding. Contrary to J.R.R.'s assertions, there is no "full faith & credit" argument. The state court affirmatively stepped aside to allow the NLRB to decide the question based on the statutory scheme intended by Congress in the creation of a uniform national labor relations policy. As the Administrative Law Judge noted, "Respondent pleaded successfully that

the arbitration be stayed since the same issues were brought before the Board." (ALJ Slip Opinion P. 3 fn. 3, App. A-16).

It is ironic that J.R.R. can assert before this Court a collateral estoppal argument, when before the state court it urged a stay of the arbitration so that the NLRB could decide the assumption issue. As noted, J.R.R. acknowledged to the state court that the issues submitted before that tribunal, as well as the NLRB, were identical. In its brief to the state court, J.R.R's counsel successfully convinced the lower court that the doctrine as enunciated in Garner v. Teamsters Local 726, 346 U.S. 485, 74 S.Ct. 161, precluded arbitraiton where the identical matter is before the Board.

Reviewing the case as it progressed, J.R.R., in arguing for collateral estoppel, relied on the following statement made by Judge Graci of the State Supreme Court:

> "There is nothing before this court to indicate that [J.R.R.] was a signatory of the agreement of collective bargaining, nor is there an indication in writing that [J.R.R.]had agreed with [J.A.R. Management], its predecessor in interest, to adopt the provision of the agreement between [J.A.R. Management] and [the Union].
>
> The law is clear and cases are legion that no one is under a duty to submit to arbitration unless by clear language he has so agreed [casess omitted]."

J.R.R. ignores the fact, however, that Judge Graci then immediately went on to make the following statement:

> "Moreover, as indicated herein, the Union submitted the same issue of unfair labor practice to the National Labor Relations

> Board. Accordingly, a state court is deprived of jurisdiction over the matter and the Union may not obtain arbitration on the same question [cases omitted]."

J.R.R. also ignores the fact that Judge Graci's judgment was significantly modified on appeal. The Appellate Division of the New York State Supreme Court, Second Department, modified Judge Graci's judgment in the following two ways (86 A.D.2d 596, 596, 446 N.Y.S.2d 193, 194 (1982)):

> (1) by adding to the decretal paragraph, immediately following the word "vacated," the following: "insofar as it affects [J.R.R.] and the motion to vacate the notice of intention to arbitrate as against [J.A.R. Management] is denied," and (2) by adding thereto aprovision that arbitration against [J.A.R. Management] is stayed pending the determination of the proceeding between [the Union] and [J.R.R.] before the National Labor

> Relations Board; upon conclusion of that proceeding, arbitration may resume to resolve those disputes arising out of the collective bargaining agreement between [J.A.R. Management] and [the Union] which have not been disposed of by the National Labor Relations Board.

Therefore, when J.R.R. cites Judge Graci's opinion and the judgment entered thereon, it neglects to note that such did not constitute the final judgment in the case. Accordingly, Judge Graci's judgment would not serve as a collateral estoppel.

In short, J.R.R. has failed to establish that Judge Graci's statement concerning adoption of the collective bargaining agreement collaterally estopped the Board from finding that J.R.R. adopted the agreement. Quite the contrary, the decisions of Judge Graci and the

Appellate Division of the State Supreme Court show that both of the state courts explicitly recognized that the issue of whether J.R.R. adopted the collective bargaining agreement was an issue that the state courts should not determine and that the Board should.

2. The law is clear that absent a specific undertaking, the Board will not impose a collective bargaining agreement of a predecessor upon a successor employer. However, in the matter at hand, the uncontroverted facts establish that when J.R.R. assumed title to the premises, it did so with the obligation that it assume the Union contract.

It is admitted by J.R.R. that Joshua Estates, Inc. was merely its nominee. The attorney for J.R.R. acknowledged that, notwithsanding the

parties listed-on the documents, the true purchaser was J.R.R. Hence, it must be assumed that the names of J.R.R. and Joshua Estates, Inc. are interchangeable.

When Joshua purchased the premises, in writing, it expressly assumed the obligations of the seller vis a vis the Union contract. This is sufficient to find an assumption. For, if a right is assigned to someone as part of an agreement, it can only be assumed that the assignment was accepted. The sale documents do not make any reference to J.R.R.'s rejection of the assignment.

Moreover, at the NLRB proceeding after various subpoenaed documents were turned over, it was further estabalished that an assignment of the Union contract was made.

J.R.R urges this Court to take the words "subject to" as constituting the entire record relating assignment of the Union contract. As noted above, the contract of sale and the closing documents contained numerous references to the Union contract. So although the sale may be said to be "subject to" the Union contract, it also appears that the Union contract was affirmatively assigned to J.R.R. and never rejected by J.R.R. At the closing the seller executed an assignment which stated that pursuant to the contract of sale, the seller assigned to J.R.R. "all the right, title and interest of the [seller] in and to the...Apartment House Agreement - 1979 with Local 32B-32S [sic] Service Employees."

Under general contract law, there must ordinarily be a valid transaction between two parties with an intent to vest the assignee with a present right on the thing assigned. (6A C.J.S. Assignments §43).

In addition, it is clear under the law that where rights under a contract are assigned, the instrument of assignment is not invalid for failure to have the signature of the other party. (see e.g., Kantor v. Aristo Hosiery Co., 222 A.D. 502, 226 N.Y.S. 582, aff'd 248 N.Y 630, 162 N.E. 553 (1928). Acceptance of the assignment can be inferred from the nature of the transaction (6A C.J.S. Assignments §63). In the matter at hand, the entire transaction compels a finding that there was an overt intent to create in the minds of all parties

to the transaction a belief that the union contract's assignment would be accepted. This was the seller's intent and J.R.R. never expressed any contradictory intent (until after the deal was consummated). J.R.R.'s actions during the closing clearly manifested an intent to assume the Union contract. This conculusion is warranted based on J.R.R.'s acceptance of pro-rated vacation monies and salaries earned by the unit employees through the date of the transfer of title.

Thus, even under traditional contract law, the Board was correct in its holding that J.R.R. was bound by the terms and conditions of the Union contract. However, the Board is not bound by technical questions of traditional contract interpretation.

The Board is free to use general contract principles adapted to the collective bargaining process to determine whether an agreement has been reached. NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1355 (9th Cir. 1981). If the Board's findings are based on substantial evidence, then this Court must affirm those findings. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); American Federation of Television and Radio Artists v. Inner City Broadcasting Corp., 748 F.2d 884, 886-887 (2d Cir. 1984); NLRB v. Donkins INn, Inc., 532 F.2d 138, 141-142 (9th Cir.) cert. denied. 429 U.S. 895 (1976).

3. Lastly, there is no basis for Petitioner's assertion that the Board failed to articulate the basis for its rejection of the collateral

estoppel argument. The Administrative Law Judge specifically found that Petitioner pleaded successfuly before the State Court that the arbitraiton be stayed since the same issues were brought before the Board (Pet. App. A-16 footnote 3). Likewise, the Circuit Court discounted J.R.R.'s contention when it noted in a footnote that the New York court granted the motion to stay arbitration finding that the Union's filing of an unfair labor practice claim with the Board deprived the state court of Jurisdiction to order arbitration. (Pet. App. A-5 footnote 3, A-6 footnote 4).

Accordingly, the Board, in affirming the decision of the Administrative Law Judge, had sufficiently and adequately set forth the facts upon which its action was

based. The fact that Petitioner's assertions needed only be dealt with in a footnote, establishes the weakness and frivolous nature of the argument. As can be seen from Judge Graci's decision and the decision of the Appellate Division, only a convoluted reading of same could result in the arguments presented by Petitioner.

## CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 85-2167

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CHAIM BABAD, BERNARD STEINMETZ and EMANUEL STEINMETZ, a Co-Partnership d/b/a J.R.R. REALTY CO.,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF OF PETITIONER

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## INTRODUCTION

This Memorandum is submitted in reply to the Brief in opposition filed by the National Labor Relations Board ("Board" or "NLRB") in this matter.[1/] It is filed in support of the Petition for certiorari.

## ARGUMENT

The relevant facts are outlined in the Petition for Certiorari.

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1/ Petitioner does not respond to the "Intervenor's" brief. Firstly, it is unclear whether an intervenor below may participate in the instant proceeding. Secondly, its detailed "merits" brief does not address the appropriateness of a grant of Certiorari. Indeed it reflects that important issues exist to be considered by the Court rather than militating against Court consideration of the issues. Finally, the positions taken are clearly at odds with the Court of Appeals' decision and the Board's brief in opposition to the Petition for Certiorari as they relate to what was and was not decided by the New York Courts.

The relevant decisions of the New York Courts are reproduced in Footnotes 2 and 3 of the Board's Brief in Opposition.[2/] The Court decisions clearly state that the collective bargaining agreements were not assumed by Petitioner. The Board found that they were assumed on the same evidence. The Board did not refer to, let alone distinguish, the Court decisions. The Court of Appeals, not the Board, dealt with the Court decisions. Hence, contrary to the Board's Brief in Opposition, the "Chenery" doctrine is clearly impli-

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2/ The full text of the Appellate Division decision is at 446 N.Y.S. 2d 193. It is noted that the Board's brief in opposition does not reflect the Court's full decision. Hence, the Court's finding that the "...contract of sale did not compel J.R.R. to adopt the collective bargaining agreement..." is given no play in the Board's brief.

cated. An administrative agency should not be permitted to play cat and mouse with a Court judgment and expect to be sustained in doing so. The agency must meet the issue and, with appropriate rationale, determine it. Accordingly, the Board should have stated why it believes the Court judgments are not binding upon it. The Court of Appeals had no Board rationale before it and it supplied the Board a rationale.[3/] This was a clear violation of the Chenery doctrine and the Court should grant Certiorari to reinforce this important doctrine. ("What we may not do, however, is to presume that the Board made findings of fact necessary to a

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3/ In this regard the Board's brief in opposition (Pg. 5) inaccurately asserts that the Board was upheld by the Court of Appeals.

defensible decision. cf Sec v. Chenery Corp., 318 US 80 (1943)"; IBEW Local 1395 v. N.L.R.B., ____ F2d ____, 122 LRRM 3265 at 3272 (CA D.C. 8/8/86) emphasis in original.

More importantly, the issues raised in the Petition are clearly important for this Court to review. Even the Board's brief in opposition, at Footnote 6, recognizes that there is a split in the Circuit Courts of Appeals on the issue of what collateral estoppel effect prior Court decisions should have on the Board. Accordingly, Supreme Court guidance is necessary to resolve this recurrent problem of dual jurisdictions in enforcement of labor contracts. Indeed, the Board itself has acknowledged that "The Courts have given uncertain guidance..." on the issue and has left "...for another day..." its own determi-

nation of whether it considers itself bound by a prior Court judgment regarding a contract. Allbritton Communications Co., 271 NLRB 201, 202 N4 (1984).[4] It is difficult to imagine why the Board would not regard this issue as important for this Court to review,[5] since it, itself, has not

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4/ The D.C. Circuit has recently pointed out that there is a Circuit conflict regarding what deference a reviewing Circuit Court should give Board findings on contract matters, even where there is no conflicting Court judgment. It has now held that Board findings on contract interpretation matters is "...entitled to 'no particular deference' 510 F2d at 805." IBEW Local 1395 v. NLRB, supra, at 3268. The Court stressed that the Board cannot be permitted to apply different standards of contract interpretation than Courts.

5/ The Board's brief in opposition (Footnote 5) thus incorrectly states that no issue of the binding effect of Court judgments is presented here. Moreover, the Court of Appeals implicitly held that the Board is precluded from relitigating a Court judgment.

reached a conclusion on the issue.

As noted in the original Petition for Certiorari, Petitioner asserts that res judicata, rather than collateral estoppel, applies herein because the Board is in privity with the charging party union. Hence, the "essential to the judgment" test would be inapplicable to a res judicata argument. (See Petition for Certiorari at 48.) The determination of this aspect of the proceeding also requires Supreme Court review of this recurrent problem. Indeed the Ninth Circuit in the Heyman case regarded res judicata as the appropriately applied standard. The Second Circuit regarded collateral estoppel as the standard. 28 USC Sec. 1738 requires review of the State Court doctrine of res judicata. If res judicata applies, there is no "essential

to the judgment" test.[6/] Thus the Board is incorrect in asserting that the case "...involves only the proper characteri-

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6/ When one reviews the Court judgment, Board brief in opposition at Fn. 2, it is difficult, if not impossible, to understand how the Court of Appeals could hold that the State Court "...did not decide..." the contract assumption issue. Moreover, while this Court has, under certain circumstances, held that a successor employer can be bound to arbitrate John Wiley v. Livingston 376 US 543 (1964) it has never held a successor bound to a predecessor labor contract Burns v. N.L.R.B, 406 US 272. The Court of Appeals found that Petitioner was not bound to arbitrate but was bound to the contract. This stands successorship law on its head. Furthermore, if collateral estoppel is applied, it was essential to the judgment finding that the agreement to arbitrate was not assumed, that the agreement containing the arbitration clause was not assumed. After all, if the agreement was assumed, as the Court of Appeals holds, the agreement to arbitrate disputes contained therein is also assumed. It is one part of a larger contract assumption. The Board's reliance on Allbritton Communications v. N.L.R.B., 766 F2d 812 is clearly misplaced. There, a judge's "merits" finding was not essential to a case that was remanded to the State Court, since the Federal Court had no jurisdiction to make those findings.

zation of the opinions of the New York State Courts..." Rather what is implicated is Federal law, i.e., 28 USC Sec. 1738, and the proper test for application of that Federal statute. (See, e.g., University of Tennessee v. Elliot, 46 S.Ct. Bull. 4170)

The Board is incorrect in asserting that the Appellate Division deferred to the Board's resolution on contract assumption. The Appellate Division did not issue a stay of arbitration pending NLRB determination regarding Petitioner. It did so only regarding the Seller, J.A.R. As to Petitioner, it did not, at all, modify the lower Court's judgment of a permanent stay of arbitration, since the contract was not assumed. The Court did not defer to the NLRB on that issue. At best, it could be argued that the Court recognized that the NLRB could

find, based on other evidence of conduct of Petitioner, that the successor was bound to the predecessor's contract, or liable for back pay, thus making arbitration against the seller redundent. The basis for such a finding, however, would not rest on the very documents that the lower and appellate courts had before them. Those documents simply did not reflect an assumption, and the Court so found. Obviously had the Court considered that the entire case was to be determined by the NLRB, as the Board's brief contends, it would have modified the permanent stay as to both Petitioner and the seller. Its order reflects that it had determined Petitioner's duties and had found no assumption and that there was a modification only as to the sellers that was to await NLRB disposition. Yet the

NLRB, on the same evidence that was before the Court, found that the contract, and for that matter, ipso facto, its arbitration clause, was assumed.

Similarly, the Board is incorrect, as was the Court of Appeals, that the only substantive matter resolved was the "...application of the arbitration clause to petitioner." Any objective reading of the decisions reflects that the predecessor's labor contract as a whole was not assumed.

## CONCLUSION

The issues raised herein are singularly ripe for Supreme Court review. They deal with an area of the law that is exceedingly unsettled and that require this Court's attention and review so that standards can be

established on those issues. (See "reasons for granting the writ" section of the Petition for Certiorari.)

Respectfully submitted,

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